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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. 53

ROY G. HARRIS and BENJAMIN F. J. ODELL,

Petitioners,

vs.

AVERY BRUNDAGE COMPANY, et al.,

Respondents.

WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS.

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THE BLAKELY-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS.

STATEMENT OF THE CASE.

The record in this cause consists solely of pleadings and orders. There was no testimony taken and there are no disputed facts. All the record facts are contained in the sworn petitions filed by respondents, the answers thereto of parties other than the petitioners Odell and Harris, the Master's reports, and the District Court's orders. Petitioners Odell and Harris filed *no* pleadings averring any facts or denying any of the facts alleged by respondents.

Petitioners' claims of errors justifying reversal are thus predicated solely upon the face of the pleadings and the findings and orders entered thereon. The allegations of said pleadings and the findings not inconsistent therewith must, therefore, be taken as true.

Petitioners have no regard for the rule that decisions of this Court are based upon the record, and not upon unsworn and unsupported statements of the lawyer for petitioners, and that the only facts in this case are those contained in the record. They have omitted some of the most vital facts in the record, have misstated and misinterpreted others, have made many statements having no basis in the record, and others directly contrary to the record. It is, therefore, necessary to make a correct statement of the case. Such a statement follows.

Respondents, Dahl-Stedman Co., *et al.* (Avery Brundage Co. was originally made a party by inadvertence), (R. 70) are 277 building contractors, members of various building trade associations. (R. 18-22.) On April 9, 1935, their respective associations made a written agreement on their behalf with the Tax Service Association of Illinois, the bankrupt. In that agreement the bankrupt agreed to act for the members of the Associations, including respondents, to litigate the question whether the Illinois Retailers' Occupation Tax, commonly known as the Sales Tax, applied to the said contractors. (R. 23.) For its services the bankrupt was to be paid $1,500 in advance and an additional specified sum, not to exceed $20,000, if the Supreme Court of Illinois decided that the contractors were exempt from the tax (R. 23.) The bankrupt agreed to retain the petitioner, Benj. F. J. Odell, as attorney for and on behalf of the contractors, but without expense to them. (R. 23.) The contractors agreed to follow such procedure as might from time to time be recommended by the bankrupt and Odell concerning filing of their monthly tax returns

and the escrowing of their taxes shown in such returns. (R. 23.) The agreement was signed on behalf of the bankrupt by the petitioner Harris, who was then Vice President and later became President of the bankrupt. (R. 24, 9.) Odell signed as follows: "I hereby consent to retention under the terms of this agreement." (R. 25.)

Respondents had no relations with Odell and Harris, except that Odell and Harris were acting for respondents under the terms of the agreement with the bankrupt. (R. 28, 30.) This agreement provided for the establishment of an Escrow Fund in order to carry out the purposes of the agreement. Pursuant to said agreement and the directions of the bankrupt, Harris and Odell, a so-called "escrow" was established at the National Builders Bank of Chicago, and respondents sent to the bankrupt their sales tax return, both originals and duplicate copies. (R. 26-28.)

Respondents consented to the establishment of the Escrow Fund and sent their checks to be deposited in said account for the purpose of having on hand and available sufficient moneys to pay the State of Illinois their respective taxes if it was decided that they were not exempt from said taxes. (R. 28.)

Pursuant to the directions of the bankrupt, Harris and Odell, respondents made their checks for the monthly taxes payable to the Sales Tax Escrow Fund at the National Builders Bank of Chicago, sent them to the bankrupt, and the bankrupt deposited the checks in that Fund. (R. 26, 28.) The Escrow Fund was established at the bank by a letter dated May 2, 1935, signed by Odell, Harris and Craig, Craig being Secretary of one of the contractors' associations. (R. 27, 28.) This letter reads (R. 27):

"National Builders Bank of Chicago.

GENTLEMEN:

"There has been opened with you a certain account entitled Sales Tax Escrow Fund. There will be de-

livered to you from time to time hereafter for deposit to the credit of said account certain checks for various amounts issued by sundry contractors.

You are hereby instructed that the funds from time to time on deposit in said account are not the funds of the undersigned, but are under the custody and control of the undersigned pending the outcome of proposed negotiations with the Department of Finance of the Sta of Illinois. Withdrawals from the account are to be made only on written order of the undersigned, three of whom must act together as indicated. Each check must bear the signature of either: Benj. F. J. Odell, or Ruth V. Willner; and R. G. Harris or P. M. Weaver, together with E. M. Craig or R. D. Steel.

(Signed) BENJ. F. J. ODELL,
R. G. HARRIS,
E. M. CRAIG."

In acting as custodians of this Fund, Harris and Odell were not acting as individuals but as representatives and agents of the bankrupt for the purpose of carrying out the agreement of April 9, 1935, between the respondents and the bankrupt. (R. 28.) The letter to the bank concerning the Escrow Fund expressly stated that Odell and Harris had no personal interest in the Fund but were mere custodians thereof. (R. 27.) Under the agreement of April 9, 1935, which expressly provided for the creation of the Escrow Fund, Odell and Harris were not to get any money, even if the litigation was successful, but the bankrupt was to get $20,000. (R. 23.) At the time respondents filed their original petition on May 24, 1937, the bankrupt, through its agents Odell and Harris, had control and custody of the Escrow Fund, although none of them were then acting for these respondents in any capacity. (R. 28, 30, 31-32.)

Pursuant to the agreement of April 9, 1935, the bankrupt kept books and records showing the amount that each respondent deposited each month in the Escrow Fund. (R. 29.) Some of the originals of the monthly tax returns sent by respondents to the bankrupt, pursuant to the agreement

of April 9, 1935, and the directions of the bankrupt, Odell and Harris, were filed with the Illinois Department of Finance. Others of said originals and all of the duplicates were kept by the bankrupt. (R. 26-27.)

Pursuant to the agreement of April 9, 1935, the bankrupt and Odell, on September 4, 1935, instituted a suit in the Circuit Court of Cook County, Illinois, in which these respondents and some other contractors were the plaintiffs. (R. 29.) The suit was for an injunction to restrain the assessment and collection of the sales tax against the plaintiffs, upon the ground that the plaintiffs were exempt from the payment of said tax. (R. 29.) The bill was dismissed and an appeal was taken to the Supreme Court of Illinois. (R. 29.) In February, 1937, the Illinois Supreme Court decided, *Blome, et al.* v. *Ames, et al.*, 365 Ill. 456, against the plaintiffs, holding squarely that the contractors were not exempt from the sales tax. On April 2, 1937, pursuant to the mandate of the Illinois Supreme Court, a decree was entered in the Circuit Court giving the contractors until June 1st to pay their taxes, with interest at 3 per cent, and providing that, if they failed to file their returns and pay their taxes by June 1st, they would be subject to the penalty of 25 per cent plus interest at 5 per cent provided in the Sales Tax Act. (R. 29-30.)

On May 3, 1937, an involuntary petition in bankruptcy against the bankrupt was filed and the District Court appointed a Receiver. (R. 2.) On May 24, 1937, respondents filed their sworn petition. (R. 18.) At that time respondents had over $297,000 of their money in the Escrow Fund and the bankrupt, acting through its agents Odell and Harris, had custody and control of the Escrow Fund and, therefore, of respondents' money. (R. 28, 32.) Craig was willing and desired to release to respondents the money belonging to them in the Escrow Fund. (R. 33.) The bankrupt, Odell and Harris were not, and had refused to re-

lease any of it. (R. 32-33.) Many of the original tax returns of respondents and all of their duplicate tax returns, which belonged to them and which they needed in order to determine the amount of their taxes, how much they had in the Escrow Fund and how much was due to the State, etc., were in the possession of the bankrupt and its agents Odell and Harris (R. 33-34), who had refused to turn them over to respondents or to the Receiver of the bankrupt. (R. 32-33.) The books and records of the bankrupt showing the amount that each respondent had deposited each month in the Escrow Fund were in the possession of the bankrupt and its agents Odell and Harris, and they had refused to turn them over either to the respondents or to the Receiver. (R. 33.)

Respondents' petition filed May 24, 1937, averred all of the foregoing facts and prayed that respondents' money in the Escrow Fund, which was in the custody and control of the bankrupt and its agents Odell and Harris, be turned over to respondents; that respondents' original tax returns which had not been filed, and all of respondents' duplicate tax returns, which they had delivered to the bankrupt and which were in the possession of the bankrupt and its agents Odell and Harris, be turned over to respondents; and that the books and records of the bankrupt showing the amount each respondent had deposited in the Escrow Fund, which were in the possession of the bankrupt and its agents Odell and Harris, be delivered to the Receiver and made available for inspection by respondents. (R. 18-38.)

Due notice of the presentation of this petition was given to the Receiver of the bankrupt, the bankrupt, Harris, Odell, Craig and the National Builders Bank of Chicago. *Without objection from any of them*, the District Court entered an order on May 24th giving leave to respondents to file their petition, making the above named parties respondents to the petition, and ordering them to file their an-

swers to the petition by May 27, 1937, and that the matter be set for hearing upon the petition and answers on May 27, 1937. (R. 17, 18.)

Upon agreement and approval in writing by respondents, the petitioning creditors, the Receivers, the bankrupt, the National Builders Bank, Odell, Harris and Craig, the District Court entered its order of May 27, 1937. (R. 39-41.) The order states that all parties had agreed in open court that the court had jurisdiction to enter the order. (R. 39.) In the order it was agreed that there was $314,885.95 in the Sales Tax Escrow Fund, as alleged in the petition of these respondents; (R. 39) that the greater portion of it represented the proceeds of checks deposited in the Fund by respondents, and the balance of it represented the proceeds of checks deposited by other contractors represented by Odell; (R. 39) and that Odell agreed to the order not merely for himself, as respondent to said petition, but also on behalf of the contractors represented by him. (R. 40.) It was ordered by the District Court that out of the Sales Tax Escrow Fund there be paid *instanter* to the Department of Finance of the State of Illinois 75 per cent of the proceeds of checks of each of the respondents herein and each other contractor deposited in said Fund, plus interest thereon, said 75 per cent plus interest amounting to $242,200; that Odell, Harris and Craig sign *instanter* a joint check for $242,200 payable to the Department of Finance, and that the National Builders Bank of Chicago honor and pay said check out of the Sales Tax Escrow Fund; that within 5 days these respondents furnish to the petitioners herein an itemized statement showing the amount that each of these respondents claimed to have deposited in said Fund; that said list and the amounts thereof be checked and examined by Odell; that he report the result thereof to the attorney for these respondents, and that, if there be any differences in the fig-

ures furnished by these respondents and the figures in the hands of said Odell, said differences be determined by the court; *"that the balance of the money in said Sales Tax Escrow Fund in the National Builders Bank amounting to* $72,685.96 *shall remain and be held in said Escrow Fund in the National Builders Bank of Chicago, subject to the further order of this court * * *; that all claims and rights in and to said balance of* $72,685.96 *in said Sales Tax Escrow Fund in said National Builders Bank of Chicago, are hereby referred to Referee William L. Sullivan upon petition of petitioners and the answers and other pleadings filed and hereafter filed thereof."* (R. 39-41.)

The bank's answer to the petition, filed May 27th, admitted the amount in the Sales Tax Escrow Fund and "disclaimed all interest in the other allegations in the petition." (R. 46.) Craig answered that he was ready, willing and eager to comply with any request of these respondents in regard to the disposition of the moneys deposited by them in the bank and to release or disburse said moneys in said Fund in accordance with these respondents' desire. (R. 47.) The Receiver of the bankrupt answered on June 3rd that he had in his possession none of the documents referred to in the petition; that the checks of these respondents deposited in the Escrow Fund were deposited not only for the purpose of having on hand and available sufficient moneys to pay the taxes on respondents' returns, if it was decided that these respondents were not exempt from said tax, but also for the purpose of assuring payment to the bankrupt of such amount as might be due it under the agreement of April 9, 1935, in the event of a favorable decision; that the portion of the Sales Tax Escrow Fund on deposit with the bank which was furnished by these respondents was subject to the jurisdiction and order of the court; (R. 50) that he, as Receiver of the bankrupt, was entitled to the possession of all the originals and duplicate

returns of these respondents in the possession of the bankrupt and Odell and Harris, and all the books, records and accounts of the bankrupt showing how much was deposited in the Escrow Fund by these respondents, which were in the possession of the bankrupt, Odell and Harris, and that they had not been turned over to him; and that he as Receiver had an interest in the moneys deposited in the Sales Tax Escrow Fund in an amount not to exceed $20,000. (R. 51, 52.)

At the time the agreed order of May 27, 1937, was entered, there was a motion of the bankrupt pending to quash the service of process upon the bankrupt, alleging lack of jurisdiction of the court over the bankrupt because of alleged defective service. (R. 6.) Odell, Harris and the bankrupt filed pleas to respondents' petition of May 24, 1937, on June 3, 1937. These pleas alleged that the District Court was without jurisdiction to determine any rights relating to the petition of these respondents while the question of the court's "bankruptcy jurisdiction" over the bankrupt was pending undetermined because of the pendency of the bankrupt's motion to quash the service upon it. (R. 54-56.) On June 29th the District Court denied the bankrupt's motion to quash the service of process, struck its special appearance, and ordered and decreed that the bankrupt had appeared in the cause generally and that the court had jurisdiction to determine the merits of the cause, (R. 75-76) and ordered the bankrupt to file its answer on the merits, which the bankrupt did on July 2nd. (R. 77.)

After this order of June 29th was entered, these respondents filed their petition of June 29, 1937. On that day the remaining balance in the Sales Tax Escrow Fund was in the custody and under the control of the District Court, as it had been in the possession and control of the bankrupt and its agents when the bankruptcy petition was filed, and

the Court's *custodia legis* had been acknowledged and confirmed by all parties in the agreed and approved order of May 27, 1937. (R. 41.) By the terms of the letter of April 2, 1935, relating to the Escrow, there was required for withdrawal of the Fund from the bank the joint signatures of Craig and the bankrupt's agents Odell and Harris. Craig had put himself on record that he had no interest in the Fund and was willing to turn it over to these respondents. (R. 47.) Odell and Harris had no interest personally in the Fund. (R. 27; 39-40.) Over $68,580 of the $72,758 in the fund belonged to these respondents. (R. 70, 71, 97.) This had been ascertained by checking and verifying, pursuant to paragraph 3 of the agreed order of May 27, 1937, (R. 40) the amount each of these respondents had deposited in the Fund. (R. 70, 71.) The Receiver of the bankrupt claimed that by reason of the agreement of April 9, 1935, he was entitled to $20,000 of this Fund. $48,580.40 of the Fund belonged to these respondents, free of any claim of anyone. These respondents' petition set forth all of the above facts, (R. 69-72) and asked that this $48,580.40 be turned over to them, leaving $20,000 of their money in the Fund so that any claims of anybody arising out of the agreement of April 9, 1935, might be reserved and later adjudicated. (R. 71-72.)

No one objected to the petition or to these respondents getting this $48,580.40 except the bankrupt (which did not stand on its objections) and Odell and Harris. (R. 74, 97.) The court directed Odell and Harris to answer the petition, and each of them stated that they did not desire to answer it. (R. 74.) The motion of the bankrupt to quash service upon it had been overruled and the court had taken jurisdiction of the bankruptcy petition on the merits. Odell's special answer and Harris' motion to strike these respondents' petition of May 24, 1937, were based solely upon the pendency of the bankrupt's motion to quash service. In

spite of this, Odell requested that his special answer to these respondents' petition of May 24th, and Harris requested that his motion to strike said petition af May 24th, stand as their respective answers to these respondents' petition of June 29th. (R. 74.) There was thus no question of jurisdiction before the court presented by Odell's and Harris' answers to these respondents' petition of June 29th. The court expressly invited Odell and Harris to answer this petition on the merits, but they insisted that they wanted to stand on their special answers of alleged lack of jurisdiction. Since, under these circumstances, there was no question presented to the court or, at the most, merely a question of law, the District Court could and should have acted on these respondents' petition *instanter*. However, it referred the matter to a Referee, acting as a Special Master. (R. 73-75.)

The Referee filed his report on July 7th. (R. 78-88.) Odell and Harris asked and obtained leave to file their exceptions to the report, and filed the same. (R. 92.) After consideration of the exceptions, the District Court entered its order of July 12, 1937, which is one of the orders appealed from. (R. 96-99.) In this order the Court found that the allegations of these respondents' petition of June 29th were true; that the Court had jurisdiction over the Escrow Fund and of the parties thereto, including Odell, Harris, Craig, the bankrupt and the bank; that there was $68,580.40 in the Escrow Fund which was the proceeds of checks of these respondents deposited in the Fund, and that of said $68,580.40, $48,580.40 was the money of and belonged to these respondents, free from any claim or demand of any kind whatsoever of any of the parties including the bankrupt, the Receiver, Odell, Harris, Craig and the National Builders Bank; and that George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers' Occupation Tax, were authorized to re-

ceive on behalf of these respondents the money belonging to respondents in the Fund. The court thereupon ordered that the exceptions of Odell and Harris be overruled and that Odell, Harris and Craig sign a joint check on the Fund for $48,580.40 and deliver it to these respondents, and that after the payment of said check the balance remaining in said Fund amounting to $24,178.35, should remain and be held in the Fund subject to the further order of the Court. (R. 96-99.) Odell's and Harris' motion to file a second supplemental answer was denied. (R. 96.)

On July 13th, on motion of these respondents, the Court ordered Odell and Harris and the bankrupt to answer to the merits concerning the $20,000, which these respondents and the Receiver of the bankrupt both claimed and which was the limit of any claim, no matter how unfounded or chimerical, which Odell and Harris might have against the Escrow Fund, and which $20,000 had been left subject to the further order of the court. (R. 99-100.) Given the opportunity to answer to the merits concerning, or state the basis of any claim they might have to the $20,000, Odell and Harris refused to do so and filed a "special answer," merely reasserting that the court had no jurisdiction over the Fund. (R. 110.) Odell and Harris appealed from this order of July 13th as well as that of July 12th.

The Circuit Court of Appeals affirmed with costs the orders appealed from, (R. 134) denied petitioners' petition for rehearing, and ordered that petitioners pay to respondents interest on $48,580.40 at the rate of 5 per cent per annum from July 12, 1937, until said $48,580.40 is paid. (R. 197.)

The above statement of facts is accurate and presents fairly all the record facts, as a reading of the record will prove. It is, therefore, not our intention to direct attention in detail to all of the misstatements and omissions of

record facts and the deliberate attempt to confuse this Court contained in the brief for petitioners. It is difficult for a litigant to reply to a statement of fact by his opponent which is unsupported by the record and is untrue or totally unwarranted, by simply pointing out that such statement has no support in the record. But, as we regard this as the only proper method of reply in this Court, we shall endeavor to adhere to it. Some few of the statements in petitioners' brief deserve special attention. For instance:

Petitioners relate (their brief, pp. 2-3) how the Escrow Fund arose. They state that the contractors sought Odell's services and requested him to represent them; that he expressed his willingness to represent them, but on condition that he would be relieved of the heavy burden of clerical details, etc.; that thereupon the trade associations procured the bankrupt, of which some of the associations and individual contractors were members, to handle these details, and entered into a written agreement to pay the association $1,500 for clerical services and designating the manner in which the payment of Odell's fee should be apportioned; that the trade associations notified Odell of this arrangement, and later the individual contractors engaged Odell by individual contracts; that, by reason of said contracts, Odell is entitled to a lien on the Escrow Fund (Petitioners' Brief, p. 52) and to support this they annex an Appendix (p. 63) purporting to exhibit such a contract.

The history of the establishment of the Escrow Fund and Odell's relationship thereto is important because it pertains to the question of jurisdiction raised by petitioners. Yet, not one of the above statements made by petitioners is true or has any support in the record. The only facts in relation to the establishment of the Escrow Fund and Odell's connection therewith are contained in respondents' sworn petition of May 24, 1937 (R. 18-37), their petition of June 29, 1937 (R. 69-73), the answers of the bank, Craig

and the Receiver of the bankrupt (R. 46, 47, 48), the Referee's report (R. 78-88) and the Court's orders (R. 39-41; 96-99; 99-101). The record facts contained in these pleadings and orders expressly refute petitioners' statements.

The contract said nothing about the contractors paying Odell a fee. On the contrary, it expressly and explicitly stated that any fee charge or expense to be paid by the contractors was to be paid to the bankrupt, not Odell; that the contractors employed the bankrupt and the bankrupt agreed to retain for the contractors, but without expense to them, Attorney Odell. (R. 23-25.) The *only* separate agreement between any of the contractors and Odell was one some contractors executed, merely giving Odell authority to act as their attorney for the purposes set forth in the agreement of April 9, 1935. (R. 25.) No contract such as Appendix A and no claim of lien by Odell appear in the record.

Petitioners assert (Petitioners' Brief, pp. 4, 52) that the Supreme Court of Illinois decided *partially in favor of* the contractors in the case of *Blome Co.* v. *Ames,* 365 Ill. 456 (their petition for certiorari, p. 3, omitted the word "partially"); that thereupon the Illinois Department of Finance was compelled to change its rulings, and subsequently the Illinois Supreme Court in *Herlihy Mid-Continent Co.* v. *Nudelman,* 367 Ill. 600, voluntarily modified its decision and held that the contractors were completely exempt from the Sales Tax and, thus, as a result of the efforts of Odell the contractors are now exempt from the Sales Tax. The facts are that the contractors' suit was decided *against* the contractors. (R. 29-30.) The case of *Blome Co.* v. *Ames,* 365 Ill. 456, held that the contractors were not exempt from the tax. A reading of the opinion in that case is all that is necessary to determine that fact. After a final decree was entered in the *Blome* case, the contractors, with the consent and approval of Odell, paid to the State on account

$242,200 of the taxes from which petitioners now assert Odell was successful in having the contractors held exempt. (R. 39, 69-71.) In December, 1937, six months after the orders here appealed from were entered by the District Court, the Illinois Supreme Court rendered its decision in the case of *Herlihy Mid-Continent Co.* v. *Nudelman*, 367 Ill. 600. The *Herlihy* case had no connection with the *Blome* case, none of these respondents were parties to the *Herlihy* case, and Mr. Odell had no connection therewith, either as party or attorney.

Petitioners' brief (p. 4) would make it appear to this Court that their statement that the Illinois Department of Finance was compelled to change its ruling in conformity with the decision in the *Blome* case is supported by the record. The record they refer to is their petition for rehearing in the Court of Appeals.

Petitioners say (their brief, p. 6) with reference to the payment of 75% of the money in the Escrow:

> "The 75% was a compromise figure (representing a tax on material only) made with the State of Illinois for the said contractors."

This statement is directly contrary to the record. The payment of 75% was a payment on account. (R. 40.)

Petitioners reiterate (Brief, pp. 7, 50) that the order of June 29, 1937, which found that the petitioners did not desire to answer these respondents' petition, etc. was a purported order obtained under most unusual circumstances by the attorney for these respondents, and was false. This assertion is utterly baseless and untrue in its entirety and has no support whatsoever in the record. It may be noted that petitioners made no attempt at any time to correct this alleged false and fraudulent order; they did file exceptions to the Master's report, in which they made a similar assertion about the order, and these exceptions the District Court overruled. (R. 92, 96.) This brazen and base-

less charge against counsel for respondents comes with total disregard of the proprieties due this Court and an attorney privileged to practice before it, and it comes from a lawyer whose unethical conduct has recently been severely censured.

See:

Odell v. *Bausch & Lomb Optical Co., et al.*, (C. C. A. 7th Cir.), 91 F. (2d) 359; certiorari denied 302 U. S. 756, 780; 82 L. Ed. 232, 347.

Petitioners state (Brief, pp. 36, 38) that the order of May 27th was entered at the solicitation and suggestion of the District Court and that it was agreed in open Court that the consent to the distribution would not jeopardize petitioners' rights to have determined the question of the jurisdiction of the Court over the 25% balance of the Escrow Fund. This is untrue and in direct contradiction to the record. There was no consent requested by the Court, there was no such insistence by the petitioners, there was no such agreement. On the contrary, the order itself, which was agreed to and approved by the petitioners in writing, expressly provided that the Court take jurisdiction and determine the distribution of the balance of the Fund. (R. 41.)

Petitioners now claim (Brief, pp. 35-36), incidentally for the first time,—that the agreed order of May 27th was entered under the "worst type of coercion and compulsion to which conscientious parties, subject to a sacred trust, can be subjected." To support their claim they say that, immediately upon the filing of these respondents' petition, petitioners took the position that the Court was utterly without jurisdiction to entertain the same. The record shows the contrary:—petitioners made no objection to the filing of the petition and to making them respondents thereto (R. 17-18); they agreed that the Court had juris-

diction to entertain the same, and asked the Court to proceed accordingly. (R. 39-41.) Petitioners say that the attorney for these respondents insisted upon an agreed order and the Court refused to authorize the disbursement except upon such agreed order. Nothing in the record sustains this assertion. Petitioners say further that the attorney for respondents, knowing the necessity for immediate disbursement, deliberately tied up the funds to prevent disbursement except upon his own terms. Nothing in the record supports this statement, and the record proves just the contrary. It proves that petitioners Odell and Harris had absolutely refused to turn over to these respondents any of respondents' tax returns or other data, or any of their money in the Fund (R. 31-33), and that it was necessary (unless these respondents were willing to pay to Odell and Harris a very substantial sum of money, for which payment there would have been no justification except to avoid vexatious litigation) that the bankrupt and its agents Odell and Harris be compelled by order of Court to turn over the money so respondents could pay their taxes.

Petitioners also say (p. 36) that the Judge was imposed upon by counsel for respondents in the pursuance of his devious plans, and as a result of his mistake allowed the petition of May 24th to be filed. The petition was filed without objection from Odell and Harris, or anyone else. (R. 17-18.) The order of May 27th was entered not only without objection from Odell and Harris or anyone else, but with their consent. (R. 39-41.) The District Court also entered the orders of July 12th and 13th and the Court of Appeals affirmed them.

Petitioners state (Brief, p. 6) that on June 29, 1937, respondents abandoned their petition of May 24th. The record shows the contrary; respondents' petition of June

29th was based upon and is supplementary to their petition of May 24th. (R. 69-72, 99, 100.)

Petitioners insist that the bankrupt was not a moneyed business or commercial corporation and, therefore, the Court had no jurisdiction over it. (Brief, p. 56.) The Special Master reported to the Court that:

> "Certainly there was nothing eleemosynary in and about the Tax Service Association of Illinois, the alleged bankrupt. It conducted a business pure and simple. * * * About the only 'not for pecuniary profit' feature of the Association was its 'not for pecuniary profit' charter"; (R. 178.)

On April 27, 1938, the District Court approved the Master's report, specifically found that the alleged bankrupt was and is a moneyed business or commercial corporation amenable to an involuntary petition in bankruptcy, and adjudicated it a bankrupt; and no appeal or review of said order has been sought. (Appendix A, *infra*, p. 71.)

SUMMARY OF ARGUMENT.

I.

The District Court Had Jurisdiction to Enter the Orders Complained Of.

A. A bankruptcy court has full and complete jurisdiction over property in the possession, control or custody of a bankrupt or of a bankrupt's agent.

B. This property includes not only property which is owned by the bankrupt, but also all property which at the time of the filing of the petition in bankruptcy is in the possession, actual or constructive, or the custody or control of the bankrupt or the bankrupt's agent.

C. The orders appealed from concern an Escrow Fund. That Fund (together with documents owned by respondents of great importance to them), at the time the District Court took jurisdiction of the Fund, was in the legal possession and actual control and custody of the bankrupt and its agents Odell and Harris; and part of the Fund was claimed by respondents to be their property and part of it the Receiver of the bankrupt claimed belonged to the bankrupt. This case, therefore, is not, as stated by petitioners, a dispute between two strangers not involving the bankrupt estate, and in which the bankrupt has no interest. No real, but only a pretended, question of jurisdiction exists in this case.

D. With the consent of petitioners and all other parties, the Escrow Fund came into *custodia legis* of the District Court, and with the consent of petitioners and all other parties the greater part of the Escrow Fund was distributed and the balance was left subject to the further order of the Court. Afterwards, petitioners filed special motions or

answers of lack of jurisdiction of the Court predicated on the pendency of the bankrupt's motion to quash service upon it. When that motion to quash was denied on June 29th, no question of the jurisdiction of the Court over the parties or the balance of the Escrow Fund remained. The order of July 12, 1937, merely distributed part of the balance of the Fund, and the order of July 13, 1937, merely ordered petitioners to plead any interest they might have in the $20,000 remaining in the Fund.

E. Courts of bankruptcy do not permit themselves to be ousted of jurisdiction by the mere assertion of a party without any facts in support thereof. At no time did petitioners present to the District Court any facts tending to show that they were not agents of the bankrupt in control and custody of the Escrow Fund, and at no time did they even make an assertion of an adverse claim.

F. A bankruptcy court has jurisdiction, before adjudication of the bankrupt, over controversies relating to the property of a bankrupt or property in the possession of a bankrupt.

G. The undisputed facts in the record refute petitioners' claim that this was a controversy between strangers to the proceedings and that Odell and Harris were not the agents of the bankrupt.

H. An undisputed bank balance under the control or custody of the bankrupt or its agents is in the constructive possession of the bankruptcy court and subject to its jurisdiction.

I. The District Court not only had jurisdiction, but it was the only court which had jurisdiction and to which respondents could have resorted.

II.

Petitioners Odell and Harris Are Estopped to Complain of or Appeal from the Orders of July 12, and July 13, 1937.

A. Odell and Harris expressly agreed that the District Court had the right and authority to determine rights in and claims to the Escrow Funds and to distribute it (which is all the orders appealed from attempt to do or do). They complied with the order of the Court, distributing over 75% of the Fund. They turned over the custody and control of the balance of the Fund from themselves, as agents of the bankrupt, to the Court.

Having done these things, they are estopped from claiming that the Court had no "jurisdiction" to distribute to respondents that part of the balance of the Fund which belonged to respondents and to which no other person had any claim.

B. Petitioners cannot, in June, 1937, object to the jurisdiction of the Court when in May, 1937, they expressly agreed that the Court had that identical jurisdiction and joined in inducing the Court to enter its order, which it could not have entered unless it had jurisdiction. But, even if the Court did not have jurisdiction over petitioners and the Escrow Fund by reason of the allegations of these respondents' petition (which, in fact, it did have), it acquired jurisdiction by reason of the explicit consent of all parties concerned, including petitioners. This is not the kind of jurisdiction, such as that dependent on a diversity of citizenship, which cannot be exercised by consent.

C. The claim of petitioners that they did not consent to what the order of May 27th actually says and that, if they did so, their consent was obtained by duress is frivolous and refuted by the record.

III.

Petitioners Odell and Harris Are at the Most Mere Stakeholders or Custodians of That Part of the Escrow Fund They Have Been Ordered to Distribute to Its Owners, and Have No Other Interest Therein and, Therefore, Have No Appealable Interest.

A. The fact that Odell and Harris have no interest in the Fund except as custodians or stakeholders is shown by the record.

B. At no time in the District Court did petitioners show or attempt to show, or even claim, that they had an interest in the Escrow Fund other than as custodians or stakeholders. Their present assertions that they have such interest were not made in the District Court, and are predicated upon their unsupported statements in their brief with no basis therefor in the record.

IV.

At No Step in the Proceedings Did the District Court Abuse Its Discretion or Deny Petitioners Any Legal Rights.

ARGUMENT.

I.

The District Court Had Jurisdiction to Enter the Orders Complained Of.

Irrespective of the consent of the petitioners to jurisdiction, or the estoppel against them to deny it, the District Court had jurisdiction to enter the orders of May 27, July 12, and July 13, 1937. In essence, this was a simple reclamation suit. These respondents claimed to be the owners of property (their Sales Tax returns and their money in an Escrow Fund) they desired to reclaim. Their property was in the custody and control of the bankrupt and its agents, Odell and Harris. (R. 18-37.) The Receiver of the bankrupt claimed that part of the property (*i. e.*, the Sales Tax returns and part of the Fund) belonged to the bankrupt and that all the property was under the jurisdiction of the Court. (R. 48-53.) The bankrupt and its agents Odell and Harris had refused to turn respondents' property over to respondents or to the Receiver. (R. 31-34.)

It is impossible to discuss or reply to all of petitioners' arguments and suggestions within the confines of a brief of reasonable length. It is also unnecessary to do so, for the facts in this case are simple and the rules of law applicable thereto are clear.

A. A bankruptcy court has full and complete jurisdiction over property in the possession, control or custody of a bankrupt or of a bankrupt's agent.

The Bankruptcy Act, Sec. 2 (6, 7) authorizes the bankruptcy court to

> "(6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary

for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

11 U. S. C. A. Par. 11 (6, 7.)

By reason of this provision, all property in the possession, custody or control of a bankrupt or its agent at the time the petition for bankruptcy is filed is in *custodia legis* of the bankruptcy court, and the court has jurisdiction to determine all controversies relating thereto. Physical possession of the property by the bankrupt is not necessary. Constructive possession, custody or control by the bankrupt or its agent makes the property subject to the jurisdiction of the court and gives that court exclusive jurisdiction to determine to whom the property belongs, or what liens or claims there may be against it, and all controversies relating thereto. The property drawn within the control of the court need not be owned by the bankrupt. It may actually belong to others, and the bankrupt or its agent may be holding it as bailee, trustee, agent or otherwise.

The principle of law that the bankruptcy court has jurisdiction of property which is in the possession, control or custody of the bankrupt or its agent at the time of the filing of the petition in bankruptcy is settled by this Court. The rule is well stated in

Page v. *Arkansas Natural Gas Corporation*, (C. C. A., 8th Cir.), 53 F. (2d) 27; affirmed 286 U. S. 269; 76 L. Ed. 1096.

The facts in that case are somewhat involved, but those pertinent to that part of the court's opinion relevant here are as follows: A petition in bankruptcy was filed against an oil syndicate. A trustee in bankruptcy was appointed and he put up placards on the property covered by a cer-

tain Bilyou lease, stating that it was in his possession as Receiver of the Federal Court, and he paid the annual rental due on the lease. One L filed an intervention claiming the lease belonged to him. The trustee filed an answer denying ownership in L and asking for a summary order directing L to execute a quit-claim deed to the trustee in bankruptcy. L had been trustee of the trust syndicate, and the lease was in L's name. The court held that L had no interest in the lease and ordered him to convey it to the bankruptcy trustee, which L did. Later it was sold by the bankruptcy trustee and subsequently certain parties claimed that the corporation to which the trustee in bankruptcy had sold the lease had no title, as the bankruptcy court had no jurisdiction to order L to make a deed to the bankruptcy trustee of the lease and, therefore, the trustee did not get good title to the lease and could not convey good title. The Court said, in part, p. 33:

> "5 Remington on Bankruptcy (3d Ed.), § 2365, p. 448, says: 'So far as concerns jurisdiction over property, the actual or constructive possession, after the filing of bankruptcy petition, by the bankruptcy receiver, trustee, marshal, or referee, or *by the bankrupt or his agents*, or by someone not claiming beneficial interest * * * constitutes '*custodia legis*' for the purpose of 'assumption of jurisdiction' by the bankruptcy court. And the bankruptcy court 'assumes jurisdiction' over 'property', and the property comes into its '*custodia legis*', if, after the filing of the bankruptcy petition, it is in the custody or control of the receiver in bankruptcy or of the trustee, marshal, referee, *bankrupt, bankrupt's agent*, or of someone not claiming beneficial interest'." * * * (Italics ours.)

One of the most thorough discussions of this rule is contained in the case of

> *Gamble* v. *Daniel*, (C. C. A. 8th Cir.) 39 F. (2d) 447; certiorari denied, 282 U. S. 848, 75 L. Ed. 752,

citing many cases decided by this Court. The Gamble case

decided that the jurisdiction of a bankruptcy court over property is determined by the fact that the property is in the possession of the bankrupt or its agent at the time the petition in bankruptcy is filed; that such possession need not be actual, but may be constructive; that such constructive possession exists in many instances, such as when the property is in the control or the custody of the bankrupt's agent, or of one who makes a claim to the property which claim is colorable only, or where it is held by someone for the account of the bankrupt, etc., and that when the Court has jurisdiction over such property it has the jurisdiction by summary proceedings to adjudicate the rights of various parties in and all claims to said property.

In

May v. *Henderson*, 268 U. S. 108, 68 L. Ed. 870, the question was as to the jurisdiction of the court over money in a bank held by assignees before bankruptcy of the bankrupt who had deposited it in the bank as trustees for creditors. The court said, in part, L. Ed., p. 873:

> "Property held or acquired by others for account of the bankrupt is subject to a summary order of the court, which may direct an accounting and a payment over to the trustee or receiver appointed by the bankruptcy court." * * * "Courts of bankruptcy do not permit themselves to be ousted of jurisdiction by the mere assertion of an adverse claim. The court has jurisdiction to inquire into the claim for the purpose of ascertaining whether the summary remedy is an appropriate one within the principles of decision here stated." (Citing cases.) "It may disregard the assertion that the claim is adverse if, on the undisputed facts, it appears to be merely colorable." * * *
>
> "The several amounts" * * * "fall clearly within the rule that, as to property in the hands of the bankrupt, or held by others for his account, 'the filing of the petition is a caveat to all the world, and in fact an attachment and an injunction.'"

To the same effect are numerous cases and authorities, including:

Remington on Bankruptcy, (4th Ed. 1936) Vol. 5, Sec. 2365, pp. 542-555.

Taubel-Scott-Kitzmiller Co. v. *Fox*, 264 U. S. 426; 68 L. Ed. 770, 774.

Mueller v. *Nugent*, 184 U. S. 1, 15; 46 L. Ed. 405, 411.

Babbitt v. *Dutcher*, 216 U. S. 102; 54 L. Ed. 402, 406.

Commercial Credit Co. v. *Street*, (C. C. A. 9th Cir.) 65 F. (2d) 102.

Chandler v. *Perry*, (C. C. A. 5th Cir.), 74 F. (2d) 371.

Central Republic Bank & Trust Co. v. *Caldwell*, (C. C. A. 8th Cir.) 58 F. (2d) 721.

Denton v. *Gurnett*, (C. C. A. 8th Cir.) 69 F. (2d) 750.

In re Hoey, (C. C. A. 2nd Cir.) 290 F. 116.

In re Kerr, 5 F. Supp. 898.

B. This property includes not only property which is owned by the bankrupt, but also all property which at the time of the filing of the petition in bankruptcy is in the possession, actual or constructive, or the custody or control of the bankrupt or the bankrupt's agent.

Petitioners' claim seems to be that a bankruptcy court has jurisdiction only over property which is owned by the bankrupt. This position is refuted by the cases. The bankruptcy court has jurisdiction not only of property which is owned by the bankrupt, but also of all property which at the time of the filing of a petition in bankruptcy is in the possession, actual or constructive, or the custody or control of the bankrupt or its agent. If a bankruptcy court has jurisdiction only over the bankrupt's own prop-

erty, then it would have no jurisdiction over reclamatio proceedings. As was said by the court in

Gamble v. *Daniel*, (C. C. A. 8th Cir.) 39 F. (2d 447; certiorari denied 282 U. S. 848.

p. 454:

"Great emphasis is placed by counsel upon the ar gument that the property in question is purely that a to which the bankrupt's possession was only that o trustee, etc.; that the bankruptcy court has no juris diction to administer such property, and that the ap pellant has. Administration of property by a bank ruptcy court involves several elements. One of thes is collection of the property of the bankrupt. In tha sense, the bankruptcy court has jurisdiction (as abov shown) to administer on all property in actual or con structive possession of the bankrupt at the time th petition is filed. Such jurisdiction is the power to de termine what title or right or interest the bankrup may have therein and to make orders in pursuance o such determination. *This exists irrespective of th character of title, right, or interest claimed therein b others, and has often been exercised where the clai was that the bankrupt held as trustee.* A few of such cases are *Equitable Trust Co. of N. Y., Trustee*, v *First Nat. Bank*, 275 U. S. 359, 48 S. Ct. 167, 72 L. Ed 313; *Cunningham, Trustee*, v. *Brown*, 265 U. S. 1, 11, 44 S. Ct. 424, 68 L. Ed. 873; *Schuyler* v. *Littlefield*, 23 U. S. 707, 34 S. Ct. 466, 58 L. Ed. 806; and the follow ing in this court: *In re Horigan Supply Co.*, 2 F. (2d) 791; *In re Blue Bird Appliance Co.*, 292 F. 127; *Cen tral State Bank* v. *McFarlin*, 257 F. 535; *Macy* v. *Roe denbeck*, 227 F. 346, L. R. A. 1916C, 12. The matter involved in this order is not whether specific property is trust property and should be turned over by the bankruptcy court to some one, but it is the matter of jurisdiction—determination of what court shall deter mine what property shall be turned over, to whom it shall be turned over, and under what, if any, condi tions it shall be turned over." (Italics ours.)

In

Remington on Bankruptcy, (4th Ed. 1936) Vol. 5, it is said, p. 554:

"Possession by the bankrupt may give jurisdiction

> to the bankruptcy court even if the possession is not exclusive, and regardless of the capacity in which he holds, whether in his own right or as agent for another."

And on p. 584:

> "No matter in what capacity the bankrupt may be holding, if he has actual possession, custody or control, it is the bankruptcy court to which resort must be had."

That rule is applied in many cases where the bankrupt or its agent was in possession of the property as bailee, pledgee or trustee, such as, for instance, cases of a stock broker where the customer has paid for the stock and the broker holds the stock merely as bailee. If the broker becomes a bankrupt, the customer must reclaim his stock in the court of bankruptcy. See

Denton v. *Gurnett*, (C. C. A. 8th Cir.) 69 F. (2d) 750,

where stock was reclaimed in the bankruptcy court although the bankrupt had no actual interest in the stock and even though, at the time the petition was filed, the stock was not in possession of the bankrupt but was pledged by it.

C. and D. The orders appealed from concern an Escrow Fund. That Fund (together with documents owned by respondents of great importance to them), at the time the District Court took jurisdiction of the Fund, was in the legal possession and actual control and custody of the bankrupt and its agents Odell and Harris; and part of the Fund was claimed by respondents to be their property and part of it the receiver of the bankrupt claimed belonged to the bankrupt. This case, therefore, is not, as stated by petitioners, a dispute between two strangers not involving the bankrupt estate, in which the bankrupt has no interest. No real, but only a pretended, question of jurisdiction exists in this case.

In the instant case, not only were the entire Escrow Fund and the Sales Tax returns of respondents in the possession, control and custody of the bankrupt and its agents Odell and Harris, but the bankrupt, through its Receiver, claimed that $20,000 of the Escrow Fund was the property of the bankrupt and possession of the returns belonged to the Receiver. Petitioners raise only a pretended, not a real, question of jurisdiction. Their claim of no jurisdiction ignores the record facts and is based upon the theory that neither Odell nor Harris were agents of the bankrupt and that the bankrupt had nothing to do with the Escrow Fund. The record facts are to the contrary. A reading of respondents' petition, (R. 18-38) particularly the contract between the bankrupt and respondents (R. 22-25) and the letter establishing the Escrow Fund (R. 27-28) will suffice to prove that the Escrow Fund, immediately upon the filing of the petition in bankruptcy, was in *custodia legis* of the Court because it was then in the custody and control of the bankrupt and its agents. The Escrow Fund was part and parcel of the entire plan agreed upon in the contract of April 9, 1935, in which the bankrupt was one party, these

respondents the other and Odell was the agent selected by the bankrupt for the purpose of enabling the bankrupt to make $20,000. (R. 23-26.) The Escrow Fund was established pursuant to the agreement between these respondents and the bankrupt; respondents consented to the establishment of the Escrow Fund and sent their checks to be deposited in it pursuant to the suggestion and request of the bankrupt and Harris and Odell. Odell's and Harris' relations and connection with these respondents were created and limited solely by the agreement of April 9, 1935, and the approval of Odell's engagement as attorney executed by some of the respondents pursuant thereto. (R. 25, 28.)

Throughout their brief, petitioners ignore the fact that the petition filed by these respondents on May 24th alleged that Odell and Harris were the agents of the bankrupt and that the Escrow Fund and the books and records of these respondents were in the possession, control and custody of the bankrupt and its agents Odell and Harris; (R. 18-38) that all of the facts in relation to the Escrow Fund set up in these respondents' petition showed that in the custody and control of the Fund Odell and Harris were acting merely as the agents of the bankrupt; that these allegations and these facts were never at any time denied by the petitioners Odell and Harris or by any other party to the proceedings; that the petitioners' so-called pleas to the jurisdiction alleged no facts; that the Court, in passing upon the so-called pleas of jurisdiction, necessarily considered the facts alleged in these respondents' petition to be true; and that when the issues made by petitioners' so-called pleas of jurisdiction to these respondents' petition of June 29, 1937 (upon which the appealed order of July 12th was entered) were referred to the Referee, petitioners, although full opportunity was given them, offered no evidence in support of their pleas. (R. 73-75, 85, 87, 96-99.)

Not only did the petitioners fail to deny the allegations of respondents' petition, but they conceded the truth of these jurisdictional facts by their consent to both the findings of fact and the decretal part of the District Court's order of May 27, 1937. (R. 39-41.)

An additional fact which petitioners ignore is significant. They did not appeal from the consent order of May 27, 1937. They appealed from the orders of July 12, and July 13, 1937. At the time the orders appealed from were entered, the Receiver of the bankrupt claimed that the entire Escrow Fund, respondents' duplicate tax returns and the books of the bankrupt showing the amounts deposited in the Escrow Fund were under the jurisdiction of the bankruptcy court, and that the bankrupt was entitled to a share of the Fund and to the books and records of the bankrupt and the tax returns of these respondents; (R. 48-53) and the bankruptcy court had, with the consent and approval of the petitioners and of all other parties, taken actual control of the Escrow Fund, the books and records of the bankrupt, the tax returns of these respondents, and the disposition of said properties. (R. 39-41.)

II. Courts of bankruptcy do not permit themselves to be ousted of jurisdiction by the mere assertion of a party without any facts in support thereof. At no time did petitioners present to the District Court any facts tending to show that they were not agents of the bankrupt in control and custody of the Escrow Fund, and at no time did they even make an assertion of an adverse claim.

Courts of bankruptcy do not permit themselves to be ousted of jurisdiction by the mere assertion of a party without any facts in support thereof. Even a third party or an adverse claimant may be ordered by a bankruptcy court to

turn over property on a summary proceeding when he has done nothing more than to question jurisdiction.

In

Mueller v. *Nugent*, 184 U. S. 1; 46 L. Ed. 405,

this court said, L. Ed. p. 411:

> "Does a mere refusal by a bankrupt or his agent so to deliver up oblige the trustee to resort to a plenary suit in the circuit court or a state court, as the case may be?
>
> "If it be so, the grounds of jurisdiction to cause the estate of bankrupts to be collected and to determine controversies relating thereto would be seriously impaired, and in many respects rendered practically inefficient. The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceed in chancery, at the risk of the accompaniments of delay, complication and expense, intended to be avoided by the simpler methods of the bankrupt law." * * *
>
> "But suppose that respondent had asserted that he had the right to possession by reason of a claim adverse to the bankrupt, the bankruptcy court had the power to ascertain whether any basis for such a claim actually existed at the time of the filing of the petition. The court would have been bound to enter upon that inquiry, and in doing so would have undoubtedly acted within its jurisdiction."

In

In re Wein, 13 F. (2d) 426,

the trustee of the bankrupt filed a petition against third parties alleging that they were withholding property of the bankrupt and that they be ordered to turn it over. The respondents objected to the jurisdiction. The objection was overruled and a turn-over order was entered. The court said, p. 427:

> "They (respondents) now claim that they had title to the materials and finished dresses, and were at liberty to dispose of them as of their own property. But the mere assertion of a claim is not enough to prevent the referee from taking jurisdiction. *Mueller v. Nu-*

gent, 184 U. S. 1, 46 L. Ed. 405; *May* v. *Henderson*, 268 U. S. 111, 69 L. Ed. 870. The claim must be more than colorable. * * * The property was in their possession as agents, or bailees, of the bankrupt, and was constructively *in custodia legis* at the time the claimants undertook to dispose of it. They should account to the trustee for the property which th y hold as such bailees."

To the same effect are

Babbitt v. *Dutcher*, 216 U. S. 102; 54 L. Ed. 402.
May v. *Henderson*, 268 U. S. 108; 69 L. Ed. 870, 874.
Gamble v. *Daniel*, 39 F. (2d) 447, 454.
In re Silverman, 299 F. 959.

At no time did the petitioners ever do more than assert that the Court had no jurdisdiction; at no time in the District Court did they present, or even make an assertion of an adverse claim. At no time did they do more than to refuse to turn over this money. At no time did they give the District Court any inkling of why they should not turn over the money or of the nature of any claim that they might have therein. They did, on the contrary, specifically consent to the District Court's taking jurisdiction of the entire Fund, distributing the major part of it, taking custody and control of the balance thereof, and deciding controversies concerning said balance and distributing it. (R. 39-41.)

F. A bankruptcy court has jurisdiction, before adjudication of the bankrupt, over controversies relating to the property of a bankrupt or property in the possession of a bankrupt.

Petitioners imply that a bankruptcy court has no jurisdiction over controversies relating to the property of a bankrupt or property in the possesion of a bankrupt until there is an adjudication. There is nothing in the decisions

which indicates that in situations of this kind the court should wait until adjudication. On the contrary, the court necessarily must exercise its powers and discretion before adjudication in a situation such as exists here. Property in the possession of the bankrupt or its agent or held for the bankrupt comes within the jurisdiction of the bankruptcy court immediately upon the filing of the petition. Jurisdiction of the bankrupt or the appointment of a trustee is not the determining factor of the court's jurisdiction over the property. It frequently happens that before adjudication a receiver appointed by the court takes possession of property held by the bankrupt, or its agent, or for the bankrupt, and, when it appears that the property held by the bankrupt or for it belongs to a third person, the court has the power to turn over the property to the person to whom it belongs or to order its receiver to turn it over, because that property is then in *custodia legis*. If the court did not have this power, great injustice would result to the owners of property held by a bankrupt or its agent in which the bankrupt had no ownership or only partial ownership.

For instance, on May 27, 1937 a great emergency existed in this case. If the court had not acted in turning over 75% of respondents' money to respondents (payment to the State was, in legal effect, turning it over to respondents to pay their taxes) respondents would have been subject to a penalty of 25% plus interest, or approximately $100,000. The Fund was in the custody of the court not only because it was then under the custody and control of the bankrupt and its agents, but because all parties concerned placed it under the custody and control of the court. That the court then acted before adjudication of the bankrupt was a matter of discretion and not one going to the court's jurisdiction, and if the court had *jurisdiction* to enter the order of

May 27th it had *jurisdiction* to enter the orders appealed from.

This rule has been frequently stated and applied. Thus, it is said in

8 Corpus Juris Secundum, Bankruptcy, Sec. 153, p. 600:

> "Third persons having an adverse claim or title giving them the right to possession of property which has come into the custody or control of a bankruptcy court pending an adjudication may assert such title and claim possession of such property by proper proceedings in the bankruptcy court; but this is the only way in which such claims can be asserted, as the bankruptcy court, by reason of its possession of the property, acquires exclusive jurisdiction to pass thereon."
>
> • • • • •
>
> "Where several conflicting claims are asserted to property in the possession of bankruptcy receiver, the bankruptcy court thereby acquires jurisdiction to determine the rights of the respective claimants in the property although the receiver cannot possibly have any interest therein."

In

Central Republic Bank & Trust Co., et al. v. *Caldwell, et al.*, (C. C. A. 8th Cir. 1932) 58 F. (2d) 721,

the court held that prior to adjudication it had jurisdiction of all property in its constructive possession; that it had constructive possession of property in the possession of the bankrupt's agent, even though the agent denied it was the agent and claimed the property belonged to it and not to the bankrupt, and that it could decide the question of jurisdiction by summary proceedings.

The law is clearly set forth in the case of

Denton v. *Gurnett*, (C. C. A. 1st Cir. 1934) 69 F. (2d) 750.

In that case there was apparently no adjudication of the

bankrupt and there was no trustee appointed. At the time of the petition in bankruptcy corporation stock belonging to A., which the bankrupt held as bailee, was in the actual possession of C. The receiver got the stock from C. Upon the petition of A. the court ordered the stock turned over to A. The opinion contains a full discussion on the jurisdiction and power of the bankruptcy court under such facts and circumstances.

See also:

5 Remington on Bankruptcy, 4th Ed. 1936, p. 580; par. 2379.

In re J. C. Winship Co. (C. C. A. 7th Cir., 1903), 120 F. 93, 96.

And in the instant case any objection to the fact that when the orders were entered adjudication had not been decreed was waived by petitioners when they agreed to the order of May 27, 1937.

Even if we assume that some objection could be made to the orders because there had been no adjudication when they were entered, no useful purpose would now be served by reversing them. No purpose would be served except to afford petitioners further delay in turning over to respondents their property. There has now been an adjudication made and trustee appointed. In their petition for certiorari petitioners failed to inform this Court that there had been an adjudication of the bankrupt from which no appeal had been sought. (Appendix, *infra*, p. 71.) But, as that fact was brought to this Court's attention in our motion to dismiss or affirm, petitioners now concede it.

G. The undisputed facts in the record refute petitioners' claim that this was a controversy between strangers to the proceedings and that Odell and Harris were not the agents of the bankrupt.

Petitioners argue (their brief, pp. 14-18) that the District Court had no jurisdiction of the Escrow Fund because the litigation was a controversy between strangers to the bankruptcy proceedings. Their argument takes no cognizance of the fact that (1) respondents' petition alleged that the Escrow Fund was held by the bankrupt and that petitioners in their relations to the Fund were the agents of the bankrupt; (2) these allegations were not denied and were conceded; (3) the Escrow Fund was merely an incidental part of a plan provided for in the contract of April 9, 1935, between the bankrupt and respondents, and that respondents' sales tax returns sent by respondents with their checks for the Escrow Fund and presumably showing the amount of respondents' estimated taxes and the amount they deposited in the fund, were in the possession of the bankrupt and its agents Odell and Harris; (4) the books and records of the bankrupt showing the amount each respondent had in the Escrow Fund were in the possession of Odell and Harris as the agents of the bankrupt; (5) the bankrupt and its agents Odell and Harris had refused to turn over respondents' property to them; (6) respondents claimed that all the money deposited by them in said Fund and their tax returns belonged to them and that said books and records of the bankrupt should be turned over to the bankrupt's Receiver, while the Receiver claimed that $20,000 of the amount deposited in the Fund by respondents and the books and records belonged to him and the bankrupt; and (7) petitioners made no claim of any kind except lack of jurisdiction of the Court.

Hardly a controversy between strangers to the bankptcy proceedings! However, "strangers to the bankptcy proceedings" are not miraculous words, the mere ention of which should cause a court in bankruptcy to un jurisdiction of property and controversies. A bankptcy court may have jurisdiction of a controversy beeen strangers to a bankruptcy proceeding when the propty which is the subject matter of the controversy is in *stodia legis*. Thus, in

In re Weston, (C. C. A. 2nd Cir.), 68 F. (2d), 913,

e property was a debt due the bankrupt, a contractor, om the State of New York for work done. Although the ate disputed the amount the bankrupt claimed was due, e court held the debt, whatever its proper amount, was *custodia legis* of the bankruptcy court. It, therefore, enined subcontractors who had filed liens against the fund rger in amount than the amount the bankrupt claimed as due, from proceeding in the state court, and held that e rights of the lien claimants had to be litigated in the nkruptcy court. The controversies in that case were ally between the lien claimants, strangers to the bankptcy proceedings. Yet, because they involved a debt fund in the constructive possession of the bankruptcy urt, that court and no other court had jurisdiction there-

Petitioners mainly rely upon the case of *Nixon* v. *Michls*, 38 F. (2d) 420. There the controversy was between tual strangers to the bankruptcy proceedings; it had no nnection with the bankruptcy proceedings; the bankptcy estate was closed and the property which was the bject matter of the controversy was in the possession a total stranger; and neither the bankrupt nor its trus- was claiming any part thereof. And in that case, im-

mediately following that part of the decision quoted by petitioners, the court said:

> "It is true that persons not parties to the bankruptcy proceedings may usually intervene or be brought in, when necessary to protect their rights in or to a *res* in the bankruptcy court."

The cases of *Henrie* v. *Henderson*, 145 F. 316, *Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549, and *Fulton Bank* v. *Hozier*, 267 U. S. 276, (the latter case was not, as petitioners state, in a bankruptcy court) are not in any way applicable to the facts in the instant case.

Petitioners' involved argument (pp. 18-24) about Section 23 of the Bankruptcy Act requires no answer. It is irrelevant because it is predicated upon an assumption that Sub-sections (6) and (7) of Section 2 of the Bankruptcy Act do not apply in this case. Petitioners claim that the Court has jurisdiction under Sub-section (7) of Section 2 only of property *owned* by the bankrupt, even though, when the petition was filed, the property was in the possession of the bankrupt or its agent or someone else holding for the bankrupt. There is no basis for petitioners' contention.

We have previously shown that if property is in *custodia legis* of the court, then controversies concerning it must be determined in the bankruptcy court no matter what the interest of the bankrupt may be.

In

Central Republic Bank & Trust Company v. *Caldwell*, (C. C. A. 8th Cir.) 58 F. (2d) 721,

the alleged agent of the bankrupt filed a petition to modify certain orders to the effect that the Receiver of the bankrupt before adjudication take possession of certain property in the possession of the alleged agent. The alleged agent claimed that it was not the agent of the bankrupt and

that the property belonged to it, not to the bankrupt. After quoting Sections 2 (7) and 23 of the Bankruptcy Act, the court said, p. 730:

"Construing these various statutory provisions as to the court wherein, and the character of proceeding (summary or plenary) whereby, the title to and rights in property adversely claimed may be adjudicated, several rules have been definitely stated: First, the bankruptcy court always has jurisdiction, as a preliminary inquiry, to determine its own jurisdiction to proceed to examine and decide, in a summary proceeding, the merits of an adverse claim; second, the bankruptcy court has jurisdiction to examine and decide adverse claims if it has possession of the disputed property. If the preliminary examination as to the existence of jurisdiction develops that such possession is present, the bankruptcy court can determine the merits in the summary proceeding before it; * * *.

"The actual possession of this disputed property was, when the involuntary petition was filed, in the receiver of the Kentucky court. If possession was in the bankruptcy court, it was constructive possession; and constructive possession is sufficient basis for jurisdiction in the bankruptcy court to determine rights as to such property in a summary proceeding." (Citing cases.)

In

Whitney v. *Wenman*, 198 U. S. 539, 49 L. Ed. 1157,

the court, after discussing the case of *Bardes* v. *Hawarden Bank*, 178 U. S. 524, cited by petitioners, said, p. 552:

"We think the result of these cases is, in view of the broad powers conferred in section 2 of the bankrupt act, authorizing the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money and distributed, and to determine controversies in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy, that when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists

to determine controversies in relation to the disposition of the same and the extent and character of liens thereon or rights therein. This conclusion accords with a number of well-considered cases in the Federal courts. *In re Whitener*, 105 Fed. Rep. 180; *In re Antiago Screen Door Co.*, 123 Fed. Rep. 249; *In re Kelloggg*, 121 Fed. Rep. 333. In the case of *First National Bank* v. *The Chicago Title & Trust Company*, decided May 8 of this term, *ante*, p. 280, in holding that the jurisdiction of the District Court did not obtain, it was pointed out that the court had found that it was not in possession of the property.

See also

5 Remington on Bankruptcy, 4th Ed. 1936, Vol. 5, Par. 2382, p. 584.

Collier on Bankruptcy, 13th Ed., p. 771.

Hebert v. *Crawford*, 228 U. S. 204, 57 L. Ed. 800.

In re Hoey, (C. C. A. 2nd Cir.) 290 F. 116, 119.

In re Bake-Rite Consolidated, 12 F. (2d) 468, 469.

But, say petitioners (their brief, pp. 24-34), Odell and Harris were not the agents of the bankrupt, and the Escrow Fund, being a deposit in a bank, was not and could not be property in the possession, custody or control of the bankrupt or its agents.

We believe that we have already demonstrated that the record indisputably shows—and without any attempt on the part of petitioners in the District Court to show otherwise—that the bankrupt and its agents Odell and Harris had possession, control and custody of the Escrow Fund and respondents' other property directly related to the Fund. In order to argue that Odell and Harris were not the agents of the bankrupt, petitioners resort to a misstatement of respondents' position. Petitioners would make it appear that respondents' position is that Odell, Harris *and Craig* were the agents of the bankrupt (Petitioners' Brief, pp. 24-25). From there they proceed to

rgue that Odell and Harris were not the agents of the ankrupt because the bankrupt had no control over Craig nd, therefore, did not have complete control over the scrow fund, and, therefore, had no control over Odell nd Harris. Respondents' position at all times was that Odell and Harris, *but not Craig*, were the agents of the ankrupt. It is true that because the bankrupt did not ontrol Craig it could not misappropriate the fund, but t is also true that the bankrupt, through its agents Odell nd Harris, had custody and control of the fund so that, owever willing and desirous Craig was to comply with espondents' wishes (Rec. 33, 47) respondents were not ble to exercise any dominion over the fund and have been leprived of it.

But, say petitioners, Odell and Harris could not be agents f the bankrupt because they were trustees for respondents, nd trustees are not agents. There were no trustees here; here were only custodians. The letter to the bank signed y Odell, Harris and Craig clearly so indicates (R. 27), nd the other allegations of respondents' petition so prove. R. 18-38.) Those custodians were Craig and the bankrupt, the bankrupt, a corporation, being represented by its gents Odell and Harris. But if, for discussion, we assume there were trustees, the trustees were Craig and the ankrupt, the bankrupt, a corporation, being represented y its agents Odell and Harris.

H. An undisputed bank balance under the control or ustody of the bankrupt or its agents is in the constructive ossession of the bankruptcy court and subject to its urisdiction.

Petitioners argue (their brief, pp. 27-30) that there was nd could be no possession of the bankrupt or its agents n this case sufficient to give the court jurisdiction because

the property was a bank balance in the National Builders' Bank. The law is directly to the contrary. Even a reading of the authorities cited by petitioners will so demonstrate. There might be something to the point if the property here concerned was merely a contested or disputed claim. The property here was a deposit in the bank, definite and certain in amount, admitted by the bank and which it was perfectly willing to turn over. Actually, the bank consented to the orders of May 27, July 12, and July 13, 1937. (R. 39-41; 46; 74; 97.)

That an undisputed account in a bank, under the control or custody of the bankrupt or its agents, is in the constructive possession of the bankruptcy courts and subject to its jurisdiction and control is well settled by numerous cases, including

May v. *Henderson*, 268 U. S. 108, 69 L. Ed. 870, 874.

Board of Trade v. *Johnson*, 264 U. S. 1, 68 L. Ed. 533.

In re Weston, et al. (C. C. A. 2nd Cir. 1934), 68 F. (2d) 913.

Twentieth Street Bank v. *Gilmore* (C. C. A. 4th Cir.), 71 F. (2d) 594.

In re Columbia Shoe Company (C. C. A. 2nd Cir.), 289 F. 465.

O'Dell v. *Boyden* (C. C. A.), 150 F. 731.

In re Hoey (C. C. A. 2nd Cir.), 290 F. 116.

In re Borok, 50 F. (2d) 75.

In re Wegman Piano Co., 228 F. 60.

Remington on Bankruptcy, 4th Ed. 1936, Vol. 5, pp. 567-569.

Petitioners cite *Board of Trade* v. *Johnson*, 264 U. S. 1, and *In re Roman*, 23 F. (2d) 556, in support of their asser-

tion. Neither support it; both actually refute it. Thus, in the case of

In re Weston, 68 F. (2d) 913,

the court said:

> "So debts due the bankrupt by third parties are within the constructive jurisdiction of the bankruptcy court. *In re Roman*, 23 F. (2d) 556; *In re Borok*, 50 F. (2d) 75, 77."

Petitioners' argument (their brief, pp. 30-34) that actual possession of the Receiver or trustee of the property is necessary for jurisdiction in a reclamation case has no support in principle or authority. Petitioners cite no case to support their position. In *Murphy* v. *Hofman, et al.*, 211 U. S. 562, the court was discussing jurisdiction when there was actual possession. It was not attempting to emphasize actual possession or distinguish between actual and constructive possession.

If a reclamation suit means reclaiming tangible property in the manual possession of the Receiver or trustee, the instant case was not a reclamation suit. Respondents were asking that a bank deposit in the custody and control of the bankrupt be turned over to them. Fundamentally, therefore, this was a reclamation suit just as were numerous other cases where manual possession of tangible property was not in the Receiver or the trustee, but where it was held that the bankruptcy court had jurisdiction of the bank deposit or Escrow Fund or chose in action for the purpose of determining to whom it belonged and of returning it to its rightful owner. Particularly is that true if, as here, there was a direct controversy between respondents and the Receiver of the bankrupt as to whether all of respondents' deposits in the Fund belonged to them or whether part belonged to them and part to the bankrupt.

In the instant case, however, when the orders appealed

from were entered, the District Court had more than constructive possession of the Escrow Fund.

On July 12th the District Court had had actual custody and control of the Escrow Fund since May 27th by the consent and with the approval of the petitioners and all other parties to the proceedings. (R. 41.) The order of July 12th provided for distribution to respondents of $48,580.40, leaving $20,000 in the Fund subject to the claims of any of the parties.

I. The District Court not only had jurisdiction, but it was the only court which had jurisdiction and to which respondents could have resorted.

The District Court not only had possession of the Escrow Fund, the Sales Tax returns and records, but it is the only court which had jurisdiction and to which respondents could have resorted. Had respondents instituted proceedings in any other court, the District Court undoubtedly would have and properly should have restrained them.

The case of

Orinoco Iron Co. v. *Metzel,* (C. C. A. 6th Cir.) 230 F. 40,

discusses this question as well as most of the contentions made by petitioners. In that case the U. S. Treasury held in escrow a fund for the benefit of the Orinoco Corporation which had been paid into the U. S. Treasury by the Republic of Venezuela. The Orinoco Corporation went into bankruptcy. One S claimed to have an equitable lien upon the entire fund and filed his bill in another court, and enjoined the trustee of the Orinoco Corporation and the Treasurer of the United States from paying out the fund. Other claimants to the fund appeared so that it seemed that none of the fund actually belonged to the bankrupt. How-

ever, the bankruptcy court enjoined the prosecution of the claim of ownership of the fund in any other court and interference with bringing the fund into the bankruptcy court to await adjudication of the rights of the respective parties thereto. The court said, p. 44:

"Was the fund in question in the possession of the bankruptcy court? The rule which gives the bankruptcy court exclusive jurisdiction to determine claims in its custody is not limited to actual possession, but extends to constructive possession as well, including property held not only by but for the bankrupt." (Citing cases) "And we have held that a debt due the bankrupt's estate is so far constructively in the bankrupt's possession as to give the bankruptcy court jurisdiction to determine the rights of parties to it." • • •

"The question is whether the fact that the fund was held in the Treasury of the United States alters the rule. No question of the right of the United States to the fund is involved. The Government makes no claim to it in whole or in part. It is merely a custodian and a trustee, recognizing (so far as concerns the fund involved here) that it holds only for the bankrupt's estate." • • •

"A court of bankruptcy, in determining conflicting claims to property in its custody acts essentially as a court of equity; and we think the case presented is within the well-established rule that, where the necessary parties are before a court of equity, it is immaterial that the subject matter of the controversy, whether real or personal property, is beyond the territorial jurisdiction of the court. In such case the power exists to compel a defendant to do all things necessary which he could do voluntarily to give full effect to the decree against him. Obedience to the decrees so made is enforced by means of process against the person." • • •

"The Supreme Court of the District of Columbia had thus, in our opinion, no jurisdiction over the suit whose prosecution has been enjoined by the bankruptcy court, not only because the jurisdiction of the latter court had already been attached, but because that jurisdiction, in the circumstances presented, is exclusive."

To the same effect are:

Board of Trade v. *Johnson*, 264 U. S. 1; 68 L. Ed. 533, 538.

Chandler v. *Perry*, 74 F. (2d) 371, 372.

In re Hoey, (C. C. A. 2nd Cir.) 290 F. 116.

In re Weston, et al. (C. C. A. 2nd Cir.) 68 F. (2d) 913.

II.

Petitioners Odell and Harris Are Estopped to Complain of or Appeal from the Orders of July 12, and July 13, 1937.

A. and B. Petitioners voluntarily turned over the custody and control of the Fund from themselves, as agents of the bankrupt, to the District Court, and expressly agreed that the court had the right and authority to determine rights in and claims to the Escrow Fund and to distribute it. Even if the court did not have jurisdiction over petitioners and the Escrow Fund by reason of the allegations of these respondents' petition (which, in fact, it did have), it acquired jurisdiction by reason of the explicit consent of all parties concerned, including petitioners. This is not the kind of jurisdiction such as that dependent on a diversity of citizenship, which cannot be exercised by consent.

Petitioners, together with the other parties interested in the bankruptcy proceedings, approved of and agreed to the order of May 27, 1937, which found that the District Court had jurisdiction of the Escrow Fund and the parties thereto and over the distribution of the entire Fund, including that part of it remaining after the payment of 75% to the Illinois Department of Finance. (R. 39-41.) Petitioners complied with the order of May 27th by (1) distributing 75% of the Fund, and (2) checking the amount that each of the respondents claimed to have de-

posited in said Fund. (R. 70, 79, 87.) Petitioners now object to the entry of the orders of July 12, and July 13, 1937, on the ground that the Court had no jurisdiction to order distribution of any part of the Escrow Fund. Thus, their appeal is based on an objection to an action of the Court which they expressly consented to, approved of and participated in. Courts have invariably held that under such circumstances a party is estopped from appealing and that the order appealed from should be affirmed without consideration of the merits of the cause. A leading case which presented a situation almost identical to that of the instant case is

McGowan v. *Parish*, 237 U. S. 287; 59 L. Ed. 955.

In that case plaintiff's testators were attorneys who had been retained on a contingent fee basis to enforce a claim against the United States. After they had rendered services, their client discharged them and retained other attorneys who finally had the claim allowed. The original attorneys thereupon instituted a suit in equity tying up the sum awarded to their former client and making the Secretary of the Treasury and the Treasurer of the United States parties defendant. A consent decree was entered by which all of the fund, except that which the original attorneys claimed, was paid to the client and the balance which was claimed by the original attorneys placed in a bank subject to the further order of the Court. In the suit to determine who was entitled to said balance of the fund, the defendant raised the question of the Court's jurisdiction over the fund.

This Court held that the objection of jurisdiction over the fund had been waived by the defendant by its consent to the decree ordering distribution of part of the fund to the defendant and that the balance be held subject to the order of the Court, and that this decree amounted to a waiver of jurisdictional questions.

The Court further held that no issue other than the one previously reserved by the consent decree could be raised by the defendant in her answer to the bill of complaint.

In *Bullard* v. *Commissioner of Internal Revenue*, (C. C. A. 7th Cir. 1937) 90 F. (2d) 144, the Court said:

> "* * * In (Freeman on Judgments) volume 2 (5th Ed.) Sec. 663, it is said: 'The same general rules which govern judgments generally apply to a judgment by consent or upon stipulation. It is an estoppel, merger or bar under the same circumstances and to the same extent as any other judgment.' In *Harding* v. *Harding*, 198 U. S. 317, 25 S. Ct. 679, 684, 49 L. Ed. 1066, the court said: 'The general rule in Illinois undoubtedly is that a consent decree has the same force and effect as a decree in invitum. *Knobloch* v. *Mueller*, 123 Ill. 554, 17 N. E. 696; *O'Connell* v. *Chicago Terminal Transfer R. Co.*, 184 Ill. 308, 325, 56 N. E. 355.' In *Swift & Co.* v. *United States*, 276 U. S. 311, 48 S. Ct. 311, 314, 72 L. Ed. 587, the court adhered to the rule in the following language: 'But "a decree, which appears by the record to have been rendered by consent is always affirmed, without considering the merits of the cause." *Nashville, Chattanooga & St. Louis Ry. Co.* v. *United States*, 113 U. S. 261, 266, 5 S. Ct. 460, 28 L. Ed. 971. Compare *United States* v. *Babbitt*, 104 U. S. 767, 26 L. Ed. 921; *McGowan* v. *Parish*, 237 U. S. 285, 295, 35 S. Ct. 543, 59 L. Ed. 955 * * *.'"

Petitioners contend that jurisdiction cannot be conferred by consent. In certain cases that is true. For instance, where jurisdiction is based on diversity of citizenship and where the record affirmatively shows that there was no diversity, that rule has been frequently applied. Such are most of the cases cited by petitioners. That is not the situation here. Here the record facts showed affirmatively that the Court did have jurisdiction of the Escrow Fund. However, any question of jurisdiction of the Court that could have been raised by any party based on any forced construction or interpretation of the undisputed facts al-

leged was expressly waived by the order of May 27th approved and consented to by all parties, including petitioners.

The same argument now made by petitioners was made by the defendants in the leading case of

Swift & Company, et al. v. *United States*, 276 U. S. 311; 72 L. Ed. 578.

This Court said, L. Ed. p. 596:

> "Decrees entered by consent have been reviewed upon appeal or a bill of review where there was a claim of lack of consent to the decree's entry; * * * or a fraud in its procurement; * * * or that there was a lack of Federal jurisdiction because of citizenship of the parties; * * * but a decree 'which appears by the record to have been rendered by consent is always confirmed without considering the merits of the cause'." * * *

And, on p. 597:

> "It is contended that the consent decree was without jurisdiction because it was entered without the support of facts. The argument is that jurisdiction under the Anti-Trust Acts cannot be conferred by consent. * * * The argument ignores both the nature of injunctions, already discussed, and the legal implications of a consent decree. The allegations of the bill not specifically denied may have afforded ample basis for a decree limited to future acts. * * * If the court erred in finding in these allegations a basis for fear of future wrong sufficient to warrant an injunction, its error was of a character ordinarily remediable on appeal. Such an error is waived by the consent to the decree. *United States* v. *Babbitt*, 104 U. S. 767, 26 L. Ed. 921; *McGowan* v. *Parish*, 237 U. S. 285, 295, 59 L. Ed. 955, 963, 35 Sup. Ct. Rep. 543. Clearly it does not go to the power of the court to adjudicate between the parties." * * *
>
> "It is contended that even if the decree is not void as a whole, parts of it must be set aside as being in excess of the court's jurisdiction. * * * Moreover, the defendants, by their consent, lost the opportunity of raising the question on appeal. * * *"

On May 24th the first order on these respondents' petition of that date was entered without objection from petitioners. (R. 17-18.) On May 27th the second order was entered with the approval and consent of all parties, including petitioners. The same day petitioners complied with that part of the order of May 27th directing them to distribute 75% of the Escrow Fund. Afterwards, in the pleading filed by petitioners on June 3rd, they questioned only the right of the Court to distribute the Fund while there was pending the motion of the bankrupt to quash service upon it. (R. 54-56.) This motion was overruled on June 29th. (R. 75.) Thereupon these respondents petitioned that the part of the balance of the Fund, to which no claim had been made, be distributed to them. (R. 69-73.) Petitioners declined to plead to the merits of this petition but insisted that the Court had no jurisdiction to distribute the Fund because of defective service of process upon the bankrupt. (R. 73-74.) They reiterated a claim that had already been adjudicated, and presented no facts. Even had they presented facts to the Court showing that they were adverse claimants, which they never did, the Court would have had full jurisdiction and power to enter the orders of July 12th and 13th.

Thus, in

Page v. *Arkansas Natural Gas Corporation*, (C. C. A. 8th Cir.) 53 F. (2d) 27, affirmed in 286 U. S. 269, 76 L. Ed. 1096,

the Court said, p. 35:

> "In 5 Remington on Bankruptcy, Sec. 2195, p. 280, it is said: 'Jurisdiction may be conferred on the bankruptcy court by the defendant's consent, in cases where otherwise it has no jurisdiction, and if adverse claimants in possession of the property who would otherwise not be within the jurisdiction of the bankruptcy court, nevertheless voluntarily surrender custody of the property, or consent to the jurisdiction of the bankruptcy court, then the question of ownership

and all other questions in relation thereto, as, for instance, the extent, validity and priority of liens upon and interest in the property, may be tried out in the bankruptcy proceedings.'

* * * * *

"Further, no objection to the form of proceeding appears to have been taken until too late."

To the same effect see:

Bachman v. *McCluer* (C. C. A. 8th Cir. 1933), 63 F. (2d) 580, 583.

In re J. C. Winship Co. (C. C. A. 7th Cir. 1903), 120 F. 93, 96.

Remington on Bankruptcy (4th Ed. 1936) Vol. 5, p. 330.

C. The claim of petitioners that they did not consent to what the order of May 27th actually says and that, if they did so, their consent was obtained by duress is frivolous and refuted by the record.

But, say petitioners, (their brief, pp. 34-40) assuming, arguendo, that jurisdiction can be conferred by consent, we did not consent. We approved of and agreed to the order of May 27th, but the order does not mean what it says and, therefore, we consented to what it means and not what it says, and, if it means what it says and we consented to it, our consent was obtained by duress.

A comparison of the statements made by petitioners with the record will serve as a reply to petitioners' argument. In our Statement of the Case we pointed out that almost all of the statements of fact upon which this argument of petitioners is predicated were contrary to the facts in the record. (*Supra*, pp. 15-17.) A few additional comments will suffice.

Petitioners say (p. 37):

"Its (the agreed order's) sole and total affect was merely an authorization by the court to your peti-

tioners, Craig and to the bank, to disburse 75% of the funds. It was merely permissive, and had no mandatory force or effect."

The order reads (R. 40):

> "It is hereby ordered, adjudged and decreed:
>
> "(1) That there be paid instanter out of said Sales Tax Escrow Fund in the National Builders Bank of Chicago * * * 75% of the proceeeds of checks of each said petitioner and each said other contractor deposited in said Fund * * *
>
> "(2) That Benjamin F. J. Odell, R. G. Harris and E. M. Craig sign instanter a joint check for $242,200 payable to * * * drawn on * * * signed as follows * * * and deliver said check instanter * * * ; that the National Builders Bank honor and pay said check * * *.
>
> "(3) That within 5 days the petitioners furnish the respondents an itemized statement * * *; that said list and the amounts thereof be examined and checked by Odell; that he report the result thereof to attorney for petitioner * * *."

They say that the language of the order "that the balance of the money in said Sales Tax Escrow Fund * * * shall remain and be held in said Fund, subject to the further order of the court" meant nothing; that it did not mean that it should remain subject to the jurisdiction of the Court and that it was really intended that such further order was to be an order dismissing the petition.

The argument, to speak bluntly, is frivolous. The argument also deliberately ignores part of the order. The order reads (R. 41):

> "4. That the balance of the money in said Sales Tax Escrow Fund in the National Builders Bank of Chicago, amounting to Seventy-two Thousand Six Hundred Eighty-five Dollars and Ninety-six Cents ($72,685.96) shall remain and be held in said Escrow Fund in the National Builders Bank of Chicago, subject to the further order of this court.
>
> "5. That the time for William L. O'Connell, Jr.,

Receiver of the Tax Service Association of Illinois, R. G. Harris and Benjamin F. J. Odell to file their answers or other pleadings to said petition, is hereby extended to and including June 3, 1937, and all claims and rights in and to said balance of Seventy-two Thousand Six Hundred Eighty-five Dollars and Ninety-six Cents ($72,685.96) in said Sales Tax Escrow Fund in said National Builders Bank of Chicago, are hereby referred to Referee Wm. F. Sullivan, upon the petition of petitioners and the answers and other pleadings filed and hereafter filed thereto."

Petitioners say (p. 38):

"At the time of the entry of the order, it was insisted by these petitioners and agreed in open Court that the consent requested by the Court to such distribution would not prejudice their rights to have determined the question of the jurisdiction of the Court over the 25% balance of said Fund."

As we have pointed out in our Statement of the Case, this assertion is untrue and refuted in every respect by the record. There was no consent requested by the Court, there was no such insistence by the petitioners, there was no such agreement. Petitioners (their brief, p. 39) point to the testimony of counsel for respondents as supporting their unjustified assertion. That testimony, on the contrary shows that the only understanding was one between the attorney for the Receiver, the attorney for the bankrupt and the attorney for these respondents (and not with the petitioners or their attorney) that the consent of the bankrupt to the order of May 27, 1937, should not be deemed a waiver by the bankrupt of its motion to quash the service which was pending at the time said order of May 27th was entered. Mr. David's testimony was taken before the Referee on the hearing of the bankrupt to quash service upon it and was occasioned by the contention of the petitioning creditors that the bankrupt, by agreeing to the order of May 27th, had waived its motion to quash service. (R. 58; 61-62.)

Petitioners also argue that the consent order was of no consequence because respondents' petition upon which it was based contained no allegations which gave the Court jurisdiction. We have previously in our statement of the case and argument shown the contrary.

But a reference to respondents' petitions (R. 19-38; 69-73) will, in themselves, suffice to show the inaccuracy of petitioners' assertion. Petitioners seem to be under the impression that the order of May 27th was a nullity because respondent's petition of May 24th did not allege the date of the petition in bankruptcy or the date of the appointment of the Receiver so that a stranger to the controversy could get a full picture of the situation. The petition in bankruptcy, the appointment of the Receiver, the motion of the bankrupt to quash were of record and the Court certainly had the right to take judicial notice of its own proceedings and orders, and the fact that they were not mentioned in respondents' petition was of not the slightest consequence.

Under the facts in this case and the law applicable thereto, petitioners are estopped to complain of or appeal from the orders of July 12, and July 13, 1937.

III.

Petitioners Odell and Harris Are at the Most Mere Stakeholders or Custodians of That Part of the Escrow Fund They Have Been Ordered to Distribute to Its Owners, and Have No Other Interest Therein and, Therefore, Have No Appealable Interest.

Mere custodians or stakeholders of a fund who have no personal interest therein have no appealable interest in a decree ordering them to distribute the fund. It appears from the undisputed facts in this record that peti-

tioners have no personal interest in the Escrow Fund, part of which they were ordered to distribute by the order from which they appeal. The undisputed facts prove that they are mere naked custodians or stakeholders. (R. 27; 34; 39-41; 96-99.) Even if their express consent to the Court's distributing the Fund is not binding upon them, their consent to and approval of the findings of fact made by the Court (R. 39-41) which prove they have no interest in the Fund are binding upon them.

A. The fact that Odell and Harris have no interest in the Fund except as custodians or stakeholders is shown by the record.

The order of May 27th which petitioners approved and consented to was based upon the allegation of these respondents' petition of May 24th. The petition alleged the creation of the so-called Escrow Fund by the letter of May 2nd. (R. 23; 27-28.) In that letter Odell and Harris said:

> "The funds are not the funds of the undersigned but are under the custody and control of the undersigned pending the outcome of proposed negotiations with the Department of Finance of the State of Illinois."

The petition alleged not only that the "proposed negotiations with the Department of Finance", but also the litigation subsequent thereto had terminated (R. 30), and the order found that there was then on deposit in the Fund $314,885.96 as alleged in the petition; that the greater portion of said Fund was the proceeds of checks of these respondents which were deposited in the Fund; and that the portion of the Fund not the proceeds of respondents' checks were the proceeds of checks of other contractors represented by the petitioner Odell. (R. 39-40.) The consent order of May 27th thus found that the

Escrow Fund consisted of moneys which belonged to respondents and to other contractors represented by Odell (R. 39-40), and therefore that petitioners had no personal interest therein. It did appear from the petition that because of the contract of April 9, 1935, the alleged bankrupt or its Receiver might have a claim to $20,000 of said Fund. The petition of June 29th and the order of July 12th confirmed all the above facts. (R. 69-73; 96-99.) Nowhere is there any finding or can any inference be drawn from any pleading or finding in the entire record that petitioners had any interest in the Escrow Fund other than as naked custodians thereof.

Petitioners say, however, that, had they not been deprived of the right to plead to the merits, they would have shown that they were not mere stakeholders or custodians of this Fund. Concerning this the Court of Appeals said:

> "Appellants do not state, but intimate they have some interest in the funds in question. If so, they should have exerted such claim. It cannot be said they did not have an opportunity to do so. On one occasion the court expressly directed them to file an answer as to the merits, but this they refused or neglected to do. Even as to the $20,000 remaining in the fund, they were given permission to answer to the merits, but instead they appeal on the alleged jurisdictional matter. Under such circumstances they are in no position to here complain of the denial of a right which they could have availed themselves of had they so desired. What interest in this fund they might assert, we do not know, but we are convinced from an examination of the record that they could have no interest or claim for services rendered in connection with the litigation of the matter of the Sales Tax, as the agreement between appellees and the alleged bankrupt explicitly provided that such services were to be paid for by the latter and without costs to appellees." (R. 133.)

Petitioners have no interest in the Fund ordered to be istributed. They therefore have no appealable interest, nd no right to appeal.

Hamilton Trust Co. v. *Cornucopia Mines Co.* (C. C. A. 9th Cir. 1915), 223 F. 494, 499.

King v. *Buttolph, et al.* (C. C. A. 9th Cir. 1929), 30 F. (2d) 769, 770.

Grier, et al. v. *Union Nat. Life Ins. Co.*, 217 F. 293.

Kirkpatrick v. *Eastern Milling & Export Co.*, 135 F. 151, 152.

B. At no time in the District Court did petitioners show r attempt to show, or even claim, that they had an inter- t in the Escrow Fund other than as custodians or stake- olders. Their present assertions that they have such in- rest were not made in the District Court, and are predi- ted upon their unsupported statements in their brief with basis therefor in the record.

To contradict the facts in the record and the statement the Court of Appeals that it appears from the record at petitioners have no interest in the $48,580.40, petition- rs, ignoring the record, state at length (their brief, p. 52) hat the answer of petitioners would have revealed had ey been allowed to file it.

They were directed on June 29, 1937, to answer respond- nts petition of June 29th and stated they did not desire answer it. (R. 74.) After the order of July 12th was tered, petitioners were directed to answer to the merits ncerning the balance of the $20,000 left in the Fund. (R. 9-100.) They refused to do so and filed "a special an- wer" merely reasserting that the Court had no jurisdic- on over the Fund. (R. 110.) Now, for the first time, they esire to reveal their so-called interest in the Fund.

As petitioners' unsupported assertions concerning the contents of their hypothetical answer have no reference or relevancy to the record before this Court, they are impossible to answer and require no answer. Petitioners have suggested in various places throughout their brief that because they had an interest in the Escrow Fund they were trustees, not agents, and that they were adverse claimants and, therefore, summary proceedings were not proper. It is decidedly pertinent that no claim of an interest in the Fund or adverse claim of any kind was ever suggested by Odell and Harris in the District Court. If petitioners believed that the Court had no jurisdiction to act because they were not agents of the bankrupt or to act summarily because they had an adverse claim, all they would have had to do was to have alleged in their pleas of jurisdiction some facts showing that they were not holding as agents of the bankrupt or evidencing some adverse claim. It was not until they were in the Court of Appeals that these suggestions were made.

However, their present statement as to what they would have shown had they allegedly not been deprived of pleading to the merits itself demonstrates that they have no interest in the Fund except as naked custodians thereof. For instance, what interest in the Fund has Harris? None has ever been suggested. Odell relies largely upon a document which petitioners present to this Court in their brief (p. 63), but which they did not set up in their pleas of jurisdiction or offer in evidence on the hearing before the Referee. The document itself which Odell so confidently relies upon shows on its face, we submit, that his interest in the Fund or his adverse claim is non-existent. But, assuming, for discussion only, that Odell actually did have agreements with some of respondents by which they agreed to pay him reasonable fees for his services, or assuming that he is entitled to re-

cover against some of respondents on a *quantum meruit* (both of which assumptions are nullified by the record and by the document not in the record contained in petitioners' brief), has he thereupon a lien or an interest in the Sales Tax Escrow Fund? Petitioners claim in their brief that Odell is a joint trustee of the Escrow Fund. If he is a trustee of a Fund belonging to over 300 contractors, then, under no legal theory has he a lien on or an interest in the Fund merely because he may have claims for legal services against some of the owners of the Fund arising out of personal contracts between them and him.

Neither by statute nor common law has a lawyer a lien on or an interest in a trust of which he is one of the trustees, merely because one or some of the beneficiaries of the trust owe him money for legal services. The Illinois Attorneys' Lien Statute merely gives a lien to an attorney on a money judgment or decree obtained by means of legal services performed by the attorney pursuant to contract with his client. There was no money judgment or decree obtained by Odell for any of respondents, but, even if there had been, petitioners are not suggesting that Odell has a lien on or an interest in a judgment or decree, but in a Fund of which he claims to be one of three trustees and of which he says there are over 300 beneficiaries. His claim is without basis or merit. See

Lewis v. *Canadian Pacific Railway Co., et al.*, (C. C. A. 7th Cir. 1930) 39 F. (2d) 834,

which opinion cites numerous cases, including

Cameron v. *Boeger*, 200 Ill. 84,

and

Story v. *Hull, et al.*, 143 Ill. 506.

Petitioners say their answer would have shown that there is an injunction pending in another court. Of course, this is totally outside the record, but even the record before this

Court indicates that there is no such injunction. If such an injunction existed, why, on May 27, 1937, did petitioners not bring it to the attention of the Court? Why were they willing to, and why did they, deliberately violate it by distributing $242,200 of the Fund? If it existed, why did the parties who obtained the restraining order in this Court consent to the orders here appealed from? If it existed, why did petitioners first discover its existence (although they say they were the persons enjoined) when this case was pending in the Circuit Court of Appeals?

Petitioners say that their answer on the merits would have shown that the Escrow Fund was subject to an attorney's lien, "as Odell had not been paid for his services rendered the contractors for engaging him and for whom he had been eminently successful."

Respondents' original petition alleged the facts concerning the contractors' suit, and the consent order of May 27th could not have been agreed to by the parties or entered by the Court if the facts so alleged in respondents' petition had not been conceded to be true by all concerned. *The contractors' suit was decided against the contractors.* A reading of the opinion in

Blome, et al. v. *Ames, et al.*, 365 Ill. 456,

is all that is necessary to determine that fact. But, even if the contractors had won that case, petitioners would have had no interest in the $48,580.40 which they refused to release. Petitioners were not to get anything out of the Escrow Fund if the suit was successful. The alleged bankrupt, and it only, was to get $20,000 if the contractors were held to be exempt from the Sales Tax. $20,000 of respondents' money was reserved by the Court in its order of July 12th, subject to all claims and rights of all persons (which included Odell and Harris) in and to said $20,000. (R. 98-99.) The claim that Odell is entitled to a lien on the $48,-

580.40 ordered distributed because of services rendered to the contractors for whom he had been "eminently successful" can be described only as fantastic.

A natural query arises: why should Odell and Harris go to the trouble and expense of this appeal? Why did they object to distributing a part of the Fund in which they have no possible interest? Why the strenuous claim on their part that the Federal Court had no jurisdiction? We suggest that it is a fair inference that they have attempted to delay the distribution of money in which they have no interest to cause annoyance and expense to the owners thereof, in the hope that their tactics may ultimately result in some material advantage to them.

IV.

At No Step in the Proceedings Did the District Court Abuse Its Discretion or Deny Petitioners Any Legal Rights.

Petitioners charge that the District Court deprived them of a hearing on the merits, and abused its discretion in disregarding equity and bankruptcy rules, that the attorney for respondents was guilty of unethical conduct, that the District Court approved false orders and then misconstrued them, and that the Circuit Court of Appeals did the same.

Petitioners' charges are without basis in the record. Most of them are predicated upon the charge that the order of June 29th (R. 73-74) was a false order and misconstrued by the District Court and the Circuit Court of Appeals. We have previously remarked about this assertion. (*Supra*, p. 15.) The balance of petitioners' charges are based upon their unsupported statements made in their brief and which they ask this Court to accept as complete refutation of record facts.

This is what the record actually shows: On May 27th petitioners agreed, as did all other parties, that the Court had jurisdiction over the Escrow Fund and over the other property of petitioners then in the possession of the bankrupt and its agents, Odell and Harris. On June 3rd petitioners filed a special motion or answer of lack of jurisdiction in the Court based solely upon the fact that there was still pending undisposed of a motion of the bankrupt to quash service upon it. (R. 54-55.) On June 29th the Court overruled the bankrupt's motion to quash and decreed that the bankrupt had appeared in the cause generally and the Court had jurisdiction to determine the merits of the cause. (R. 75-76.) Then, and not until then, respondents' petition of June 29th was filed. No one except Odell, Harris and the bankrupt objected to the entry of an order in accordance with the prayer of the petition, (R. 74, 97) and the bankrupt did not stand upon its objection. The Court directed Odell and Harris to answer to the merits of the petition. They said they did not desire to do so but desired to stand on the special motions or answers they had filed to the petition of May 24th. (R. 74.) The Court said in substance: "But I have decided that question of jurisdiction by overruling the bankrupt's motion to quash and therefore direct you to plead to the merits." Odell and Harris refused to plead. There was nothing then before the Court except a question of law that the Court had already decided. However, the Court gave the petitioners full opportunity to argue the question before the Referee. When the Referee made his report Odell and Harris asked leave to file exceptions and filed them. (R. 92, 97.) The exceptions were considered and overruled (R. 98) and the order of July 12th was entered. Even then no motion was made to file an answer on the merits. *After* the entry of the order of July 12th, petitioners asked leave to file, not an answer on the merits, but a second amended

supplemental answer, (R. 96) which answer, considering what had proceeded and what followed, would merely have been another attack on the jurisdiction of the Court. The next day, July 13th, the Court entered an order concerning the $20,000.00 of respondents' property, which would remain in the fund if the $48,580.40 was distributed as provided for by the order of July 12, 1937. The Court again overruled petitioners' special motions or answers of lack of jurisdiction based upon the bankrupt's motion to quash which had been overruled, and directed petitioners to answer to the merits within twenty (20) days as to this $20,000.00. (R. 99-101.) They answered but not to the merits. They claimed the Court had no jurisdiction to order them to answer to the merits. (R. 110-111.)

In considering petitioners' claim that they were deprived of a right to plead to the merits it should be noted that in spite of the numerous opportunities given them to plead to the merits they consistently refused to do so; that their position in this Court concerning the District Court's lack of jurisdiction was never presented in the District Court; that their claim in the District Court of its lack of jurisdiction was predicated solely on the alleged fact that the Court did not have jurisdiction of the bankrupt; that the Court had taken preliminary jurisdiction of the bankrupt when the petition in bankruptcy was filed on May 3rd, and on June 29th, before the orders here appealed from were entered, had adjudicated that it had full jurisdiction of the bankrupt and to hear the cause on its merits; that in petitioners' special motions or answers to the jurisdiction not a single fact was alleged; that petitioners' position is that they have a right to reserve answering on the merits until their claim of the lack of jurisdiction of the District Court is decided against them not by the District Court, but by the District Court, the Circuit Court of Appeals, and this Court.

The order of June 29, 1937, finds that petitioners stated they did not desire to answer respondents' petition but desired to stand on their special motions or answers. Petitioners say this order is false; that at no time did they say they did not desire to answer the petition or be heard on the merits (Petitioners' brief, p. 51). This presents the following situation: The record unequivocally shows that petitioners stated that they did not desire to answer the petition and made no attempt to offer any evidence on the merits, and that the District Court, by overruling petitioners' exceptions which asserted the order was false, expressly found that petitioners' claim that the order was false or incorrect was not true. To refute all this we have the unsupported assertion of petitioners.

Petitioners claim (their brief, p. 51) that error was committed because the Referee recommended the signing and honoring of the check for $48,580.40, although the order of June 29th did not refer the matter to the Referee on the bank's answer and the bank had not been present at the hearing. They blithely ignore the fact that the bank and all other parties except the petitioners, had already consented to the prayer of respondents' petition. (R. 74, 97.)

The reference to William L. Sullivan was not a reference to him as a Referee in Bankruptcy, but as a Special Master, because there had been no adjudication of the alleged bankrupt. Therefore Rule 14 of the Bankruptcy Act is not applicable. Equity Rule 66, if at all applicable, was in no way violated. In any event the Court was not bound to follow Equity Rule 66. The equity rules are to be looked to as analogies but not as rules binding upon the Bankruptcy Court.

In Re Kenney & Greenwood, 23 F. (2d) 681.

International Harvester Co. v. *Carlson*, 217 F. 736.

Under the circumstances which existed here, when there was only one question before the Court, and that of law with no testimony or disputed facts, it was even superfluous for the Court to refer the case to the Master or to give the respondents leave to file exceptions to the Master's report. On June 29, 1937, the matter of jurisdiction over the bankrupt had been decided by the Court. That question was no longer before the Court, but the petitioners said in effect: "We refuse to answer to the merits; we stand upon the position that the Court has no jurisdiction in this case because it has no jurisdiction over the bankrupt." That this was petitioners' position and their only position is proved by the fact that when they were directed to answer to the merits as to the $20,000.00 (even after they had refused to answer to the merits concerning the $48,580.40), they again said: "We refuse to answer to the merits, we intend to stand upon our position that the Court has no jurisdiction because it has no jurisdiction of the bankrupt." And petitioners seem to have the impression (their brief, p. 54) that in a Trial Court they can file a plea of jurisdiction, have that plea overruled, refuse to plead to the merits, say they will stand upon their point of lack of jurisdiction, and then, after the Court has entered an order upon the basis of the facts before it in the sworn pleadings, claim that the order should be reversed because the Court refused to grant them leave to plead to the merits.

Petitioners go so far as to say that, although the bankruptcy petition alleged that the alleged bankrupt was a moneyed, business or commercial corporation within the purview of the Bankruptcy Act (R. 2), and although on June 29th the Court overruled the bankrupt's motion based upon the ground that the Court had no jurisdiction over it, and decreed that it had jurisdiction of the bankrupt and of the merits of the cause (R. 75-76), and al-

though later the Court expressly adjudicated that the bankrupt was a moneyed, business or commercial corporation within the purview of the Bankruptcy Act (Appendix A, *infra*, p. 71), this cause should be reversed because petitioners still claim that the bankrupt is a corporation organized not for pecuniary profit and is, therefore, not within the purview of the Bankruptcy Act, and this is a question of jurisdiction over the subject matter and still open to collateral attack. (Petitioners' brief, p. 56.) Their argument answers itself, but it may be suggested that the question of whether the bankrupt was or was not a business corporation is a question of jurisdiction of the person, *i. e.* the bankrupt, and not of the subject matter.

Petitioners say (their brief, p. 58) that the Tax Service Association requested an immediate hearing on June 29th, but the matter was continued until September 21st, and that they cannot refrain from comparing this delay with the speed and facility with which the Escrow Fund litigation has been handled. The bankruptcy petition was filed May 3, 1937 (R. 2). In his report filed July 8, 1937, over two months later, Referee Sullivan said:

> "While it is, of course, only right and proper that a corporation, against whom an involuntary petition in bankruptcy is filed, should be entitled to an early hearing consistent with the rules and convenience of the court, yet in this case the alleged bankrupt corporation certainly had done nothing up to this time to facilitate an early hearing upon the involuntary petition against it." (R. 90.)

It is submitted that the District Court exercised its discretion wisely, that it treated petitioners with more patience and consideration than they deserved, and that it gave them ample time and full opportunity to present their claims and their rights.

Conclusion.

The petitioner, Benjamin F. J. Odell, is an attorney selected by the bankrupt to act for respondents without charge to respondents. He was not only the selection of the bankrupt, but was to be paid by the bankrupt. The petitioner, Roy G. Harris, is the President of the bankrupt. Together, the bankrupt, Odell and Harris devised the neat scheme of not merely making the $21,500 if they were successful in the Sales Tax Litigation, but of also having respondents put a large sum of money in their custody and control so that, if they were unsuccessful in the litigation, respondents would nevertheless be unable to obtain their money unless they met petitioners' demands. When petitioners were confronted by the possibility that their refusal to turn over respondents' money to respondents might subject them to a personal liability of $100,000, they consented to the District Court's taking jurisdiction of the Escrow Fund and distributing it. Then, believing that they had relieved themselves of the possibility of that personal liability, they attempted to retract their consent and claim that the Court had no jurisdiction. They have no interest in the Fund, certainly not that part of the Fund which the Court ordered them to turn over to respondents.

Under these circumstances and for the reasons above set forth, it is respectfully submitted that the orders of the District Court of July 12, and July 13, 1937, and the orders of the United States Circuit Court of Appeals affirming with costs said orders of the District Court, and ordering that petitioners pay to respondents interest on $48,580.40 at the rate of 5% per annum from July 12, 1937, until said $48,580.40 is paid, are correct, just and proper, and should be affirmed.

It is further respectfully submitted that petitioners' ap-

peal to the Circuit Court of Appeals and their Writ of Certiorari from this Court have been prosecuted merely for the purpose of delay; that the questions on which the decision of this cause depends are trivial and unsubstantial; and that this Court should, therefore, also enter an order assessing against petitioners damages in the sum of 10% of $48,580.40, in accordance with Rule 30 of this Court.

Respectfully submitted,

SIGMUND W. DAVID,

Attorney for Dahl-Stedman Co., et al., Respondents.

APPENDIX A.

IN THE DISTRICT COURT OF THE UNITED STATES.
For the Northern District of Illinois,
Eastern Division.

In the Matter of TAX SERVICE ASSOCIATION OF ILLINOIS, a corporation, Alleged Bankrupt.	In Bankruptcy No. 65890.

ORDER APPROVING REPORT OF SPECIAL MASTER, ORDER OF ADJUDICATION IN BANKRUPTCY, ETC.

This cause coming on to be heard upon the motion of the petitioning creditors for the approval of the report of Special Master William L. Sullivan, with reference to the involuntary petition in bankruptcy and the second amended answer filed thereto, and upon the exceptions of the alleged bankrupt heretofore filed to the said Special Master's report. • • •

And the Court having heard arguments of counsel and having considered the said Special Master's report, the exceptions of both the alleged bankrupt and the petitioning creditors filed thereto, the transcript of evidence, the pleadings, the abstracts and the briefs of the respective parties, and being fully advised in the premises, finds:

• • •

2. That this Court has jurisdiction of the subject matter hereof and of the parties hereto.

3. That on the day of the filing of the involuntary petition in this cause, and prior thereto, the alleged bankrupt was and is a moneyed business or commercial corporation

amenable to an involuntary petition in bankruptcy within the purview of the Bankruptcy Act.

* * *

10. That an order should be entered forthwith adjudicating Tax Service Association of Illinois a bankrupt and referring this cause generally to a Referee in Bankruptcy;

* * *

It is further ordered that Tax Service Association of Illinois, a corporation, be and it is hereby ordered adjudged a bankrupt and this case be and it is ordered referred generally to the Honorable William L. Sullivan, Referee in Bankruptcy, and that a rule be and the same is hereby entered upon the alleged bankrupt to file its schedules in this cause within Ten (10) days from and after the date hereof.

* * *

ENTER:

PHILIP L. SULLIVAN,

Judge.

To the entry of which order the alleged bankrupt excepts.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } ss.

I, HENRY W. FREEMAN, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that the annexed and foregoing is a true and full copy of the original Order entered April 27, 1938, In the Matter of Tax Service Association of Illinois, a corporation, in bankruptcy No. 65890 now remaining among the records of the said Court in my office.

I further certify that to the date hereof no Appeal has been taken from said Order.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 13th day of September, A. D. 1938.

HENRY W. FREEMAN,

(SEAL)

Clerk.